SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 229.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE CITY OF WELLSVILLE, OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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3 UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, *ss:*

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Cleveland, in said district on the first Tuesday in October, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States of America, the one hundred and forty-seventh, to wit, on Monday the 20th day of November, A. D. 1922.

Present: Honorable Maurice H. Donahue, Circuit Judge; John M. Killits, District Judge; D. C. Westenhaver, District Judge, United States Judges.

THE CITY OF WELLSVILLE, OHIO, vs. THE UNITED STATES OF AMERICA, AND THE Steubenville, East Liverpool and Beaver Valley Traction Company, Interstate Commerce Commission.	No. 682. In equity.

Said action was commenced on the 16th day of December, A. D. 1921, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

4 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Complaint in equity.

Filed Dec. 16, 1921.

The plaintiff, the city of Wellsville, Ohio, is a municipal corporation duly organized as a city under the laws of the State of Ohio, and is located in the territory under jurisdiction of the court above designated.

The defendant, the Steubenville, East Liverpool and Beaver Valley Traction Company, is a corporation duly organized under the laws of Ohio and is a common carrier of passengers for hire.

The United States of America is made a defendant in the foregoing action by and under authority of section 968 of the Revised Statutes of the United States as numbered in Barnes Revised Statutes of the United States.

The defendant, the traction company above named, owns and operates an electrical street railway from the western boundary line of the city of Wellsville, Ohio, to the eastern boundary line of the city of East Liverpool, Ohio, a distance of about ten miles, all of which lines operate over and upon the streets of East Liverpool and Wellsville Ohio.

The distance from the business center of the city of Wellsville, Ohio, to the business center of East Liverpool, Ohio, is a distance of about four miles, and all of this right of way, is paved except the part owned by the defendant for a private right of way, and part of this right of way is over the county road leading from Wellsville to East Liverpool; that the greater part of the inhabitants of the city of Wellsville and of East Liverpool are carried each day over the lines of the said traction company to their work, and large numbers of the inhabitants of each city are employed in factories or stores located in the other city, and are carried to and from their work on the lines of the said defendant the traction company above named, and all the inhabitants of both Wellsville and East Liverpool and the suburbs of said cities are dependant upon said street car line for transportation.

The line of said street railway was first constructed and operated in the year 1892, and in order to construct said lines, Albert M. Johnston, Sidney H. Short, and C. E. Grover applied to the council of the city of Wellsville, Ohio, for a franchise to construct such line over the streets of said city, and on September 14th, 1891, at their request, the council of the city of Wellsville Ohio duly adopted an ordinance, which ordinance was duly accepted by said applicants. By the terms of said ordinance said parties and their legal successors in title were given the right to const'uct, maintain, and operate for a period of twenty five years an electrical street railway over certain streets in said city; said ordinan'e further provided that a fare of five cents should be charged for each ride for each passenger over the whole or any part of said street railway or any part thereof or any extention of the same, and said franchise ordinance further provided that the said grantees should place good and sufficient cars upon said line and run them as often and at such rate of speed as public convenience may demand or as the council of said city might require.

And to extend said railway, and in order to provide an extension thereof over the streets and roads of Wellsville, to and through the streets of East Liverpool, Ohio, and Johnston, Short, and Grover obtained at about the date of the said franchise from the city of Wellsville a franchise from the county commissioners of Columbiana County, Ohio, to construct said railway from the easterly corporate line of Wellsville to the westerly corporate line of East Liverpool, and they also on or about said date obtained a franchise from the council of the city of East Liverpool, Ohio, giving them and their successors and assigns the right to construct an electric street car line from the westerly corporation line of said

city to the easterly corporation line thereof, and to use the streets of said city for such purpose.

In pursuance of said franchises so obtained from the cities of Wellsville and East Liverpool and the county commissioners of Columbiana County, Ohio, said Johnston, Grover, and Short built and operated an electric street car line from and through said cities and over said public road.

It was provided in all of said ordinances and franchises so obtained as heretofore stated that the rate of fare over the entire route of said railway or any part thereof should be five cents for each passenger, and before the construction of said street railway said grantees accepted the provisions thereof in writing.

Said grantees so operated said line of railway until they assigned their rights granted under said ordinances and franchises, and by successive assignments the East Liverpool Railway Company, a corporation, became the owner and was the owner on November 19, 1901, of said railroad and all the rights granted by said ordinances, and on that date the East Liverpool Railway Company applied for a franchise to the council of the city of Wellsville, Ohio, and in pursuance of said application the council of said city, on November 19, 1901, duly passed an ordinance by the terms of which the East Liverpool Railway Company, its successors and assigns, was granted the right

7 to construct, maintain, and operate an electric street railway on the streets of said city, to wit, from 18th Street to the southern line of Clark Avenue in said city. It was one of the provisions of said ordinance that said grant should be for a period of twenty-five years, and that the rate of fare should be five cents for each person carried over the line as operated in the cities of Wellsville and East Liverpool and between said cities or on any extension thereof, and it was further stipulated that said company should run good cars over said line as often as required by public convenience or by the city council. Said franchise was duly accepted in writing by said company. It was further provided in said franchise that all the rights granted to Johnston, Sidney, and Short by the council of Wellsville, Ohio, on September 19, 1891, and all the terms of said ordinance should become a part of the ordinance passed November 19, 1901, and said first ordinance was copied into and made a part of the latter ordinance.

Said company under the terms of said franchise at once extended its lines as provided in said ordinance.

Afterwards the council of the city of Wellsville, Ohio, to wit, on the 19th day of September, 1905, on the application of said company, duly passed an ordinance, being ordinance No. 594 of the ordinance of said city, extended the franchise for a period of twenty-five years, the grants owned by said company, and said company duly accepted the terms of said grant in writing, and this ordinance provided that the rate of fare over the entire line between the city of Wellsville to East Liverpool and to and over the entire line or any part thereof should be five cents for each passenger so carried.

That on or about the day of , 1916, the defendant herein, The Steubenville, East Liverpool and Beaver Valley Traction Company, purchased and acquired all the rights and property and franchises of the said The East Liverpool Railways Company in the cities of Wellsville and East Liverpool and from the county commissioners of Columbiana County, Ohio, and now owns and
8 operates the same by reason of the grants heretofore mentioned herein, and subject to all the terms and conditions thereof, and in the year 1905 this defendant traction company built an interurban line of electrical railway from Steubenville, Ohio, to the western corporation line of Wellsville, Ohio, where it connected with the line of railway operated under said franchises from Wellsville to the easterly line of East Liverpool, Ohio, and said traction company has continued to operate its said cars from Steubenville, Ohio, to East Liverpool, Ohio, but the same runs over the line operated from the westerly corporation line of Wellsville to the easterly corporation of East Liverpool under the said franchise ordinances heretofore set forth.

And in the year 1905 the Beaver Valley Traction Company built a line of electric railway from Beaver in the State of Pennsylvania to the easterly corporation line of East Liverpool, Ohio, and run its interurban cars by electricity from the eastern corporation line of East Liverpool, Ohio, over the tracks of said the East Liverpool Railway Company and the East Liverpool Traction and Light Company, owned by the East Liverpool Railway Company, and said the East Liverpool Traction and Light Company from 1905 operated its line from the eastern limits of East Liverpool to the westerly limits of Wellsville, Ohio, and said three companies, continued to so operate over their respective lines until the defendant traction company about the year 1916 acquired by merger all three of said lines. And on or about the day of 1916 said defendant herein by said merger acquired the control or ownership of said car lines and said franchises in and between the cities of East Liverpool and Wellsville, Ohio, and has since said date operated the same under said franchises, and said defendant has no other franchises or right to so occupy the streets of said cities or the highway between said cities except such right as is granted in and by said franchise ordinances of said cities and said county commissioners. That the
9 last grant made by the city of Wellsville, Ohio, and duly accepted by the predecessor in title to said defendant traction company and now owned by this defendant as granted by the council of said city of September 19, 1905, being ordinance number 594, provides in section two thereof that " It is one of the conditions of this ordinance and one of the considerations for this grant for the use of said streets for a double track that grantee or its successors or assigns shall charge for a fare the sum of five cents for each person carried over the entire route from the westerly corporation line of Wellsville, Ohio, to the State line between Ohio and Pennsylvania or any part thereof, but policemen and regularly paid firemen of said city when in uniform shall be carried free."

The corporation line between Ohio and Pennsylvania is also the easterly corporation line of the city of East Liverpool, Ohio.

At the time of the granting of the said ordinance number 594 similar ordinances were granted by the city of East Liverpool, Ohio, and the county commissioners of Columbiana County, Ohio, and all of such ordinances provide that said owner of the franchise may charge the sum of five cents for each passenger carried over the line of said railway in and between said cities or any part thereof.

By the laws of Ohio any such traction company is forbidden to charge any greater rate of fare than that stipulated in any such franchise ordinance so passed by the proper authority of a city or a county and duly accepted by any such traction company.

That notwithstanding such provisions of the laws of Ohio, the defendant traction company are asserting the alleged right, claimed by virtue of the act of Congress passed February 29, 1920, and known as the transportation act of 1920, to disregard the laws of Ohio and are asserting that they are not bound by any of the laws of Ohio, but on the contrary they have the right to put into effect a higher rate of fare than that allowed by said franchises under which it is operating for the transportation of passengers.

That on or about April 12, 1921, said defendant traction company filed an application before the Interstate Commerce Commission, being known as number 12092 on the docket of said commission, praying for an increase in the rate of fare charged on said traction lines described herein between said cities, and on the 7th day of November, 1921, said Interstate Commission directed said traction company to increase the rate of fare over the said lines from the westerly corporation line of Wellsville to the easterly corporation line of East Liverpool, Ohio, so that a passenger riding over said line should and would be compelled to pay the sum of fifteen cents, the said commission by its order dividing the said lines into three zones, to wit, from the westerly corporation line of Wellsville to Kountz, a fare of five cents for each passenger carried; from Kountz to the Diamond in East Liverpool, a fare of five cents for each passenger so carried; and from the Diamond to the easterly line of East Liverpool or the Ohio and Pennsylvania line the sum of five cents, thus making the rate of fare over said line the sum of fifteen cents for each passenger so carried over the entire line of said road and a charge of ten cents over the rate allowed by the franchise ordinances now in effect.

This plaintiff avers that the said act of Congress, known as the transportation act of 1920, does not confer or grant, nor to purport to confer or grant, the authority claimed by these defendants; but if it does purport to grant such authority, then and in that event the plaintiff avers that said transportation act, in so far as it attempts to confer such authority, is unconstitutional, void, and unenforcible, because it would in that event deprive the State of Ohio of its

police power expressly reserved to it by article ten of the
11 Constitution of the United States, and would deprive the plaintiff and its citizens of property without due process of law, and would deprive plaintiff of its right to enter into a franchise contract with any corporation, and would set aside valid and binding contracts without due process of law.

Plaintiff and its officers and employees in the discharge of their duties are obliged to and do travel over the lines of said traction company as passengers, and the fares charged therefor by said traction company, defendant herein, are paid by plaintiff from public funds, and that if the increased rates which defendants are about to put into the effect as herein complained of are charged such officers and employees such increase will be paid by plaintiff and its public funds are thus used and lost.

That the city of Wellsville, Ohio, has a population of about 9,000, and the city of East Liverpool has a population of about 25,000, and that there are about 15,000 persons in the territory surrounding said cities, all of whom are dependant upon the lines of said traction company for transportation, and all of whom do use said lines.

That said defendants are threatening to, and will unless restrained by this court, put into operation in Ohio and on the lines of said street railway rates and fares far in excess of the lawful rates and fares for the transportation of persons and property within the State; that during the year 1920, 3,227,652 persons were so carried over said line, all of whom paid fare as passengers, and there at least that many persons still use said lines as passengers, and if compelled to pay such rate of fares as proposed the people of the State of Ohio and of said cities and its surburban territory will be deprived of thousands of dollars in value and of their rights without due
12 process of law, which will result in great disorder from resistance to such rate so proposed, and in a multiplicity of suits both criminal and civil, and will ignore and deprive the State of its constitutional powers and of its police power, to its irreparable damage, and will result in the taking away the right of plaintiff to enforce its valid contracts, to the irreparable damage to the State of Ohio and to plaintiff, and said State and plaintiff and the citizens so affected are without any adequate remedy at law.

Wherefore plaintiff prays that a temporary injunction may issue against the defendants herein, forbidding each of them to put into effect or operation in intrastate commerce of the State any rate of fare for the transportation of passengers within the State or over the line of said traction company between and within the cities of Wellsville or East Liverpool covered by said franchise ordinances not authorized by the laws of Ohio or by said franchise ordinances of said cities, and that upon final hearing said injunction may be made final and perpetual, and for all proper relief.

CHAS. BOYD,
City Solicitor of Wellsville, Ohio.

[Affidavit of Geo. D. Ingram to above paper omitted in printing.]

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7262

Exhibit A to complaint.

Interstate Commerce Commission.

No. 12092.

Ohio and Pennsylvania rates, fares, and charges.

In the matter of rates, fares, and charges of the Steubenville, East Liverpool & Beaver Valley Traction Company within the States of Ohio and Pennsylvania.

Submitted April 8, 1921. Decided November 7, 1921.

Certain intrastate passenger fares maintained by petitioner in Ohio found to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Fares prescribed which will remove such preference, prejudice, and discrimination.

Agnew Hice, T. H. Hogsett, and C. R. Marshall for petitioner.

Edward E. Corn for Public Utilities Commission of Ohio.

Perry L. Rigby for city of East Liverpool, Ohio; Ralph Levinson for city of Steubenville, Ohio; and Charles Boyd for city of Wellsville, Ohio.

Report of the Commission.

BY THE COMMISSION:

This proceeding was instituted by us upon petition filed on behalf of the Steubenville, East Liverpool & Beaver Valley Traction Company, hereinafter called the traction company, operating an electric interurban line between Vanport, Pa., and Steubenville, Ohio, and intermediate points, and also a local service between certain points within Ohio, and a branch line to Chester, W. Va. In substance the petition alleges that by reason of various franchises, ordinances, and regulations imposed under authority of certain municipalities of the States of Ohio and Pennsylvania, the petitioner is unable to increase its fares for the transportation of passengers intrastate to the basis maintained on interstate traffic, resulting in undue and unreasonable advantage and preference to persons and localities in intrastate commerce on the one hand and in undue prejudice and disadvantage to other persons and localities in interstate commerce on the other hand, and also in unjust and unreasonable discrimination against interstate commerce; and, further, is deprived of sufficient revenue to pay its operating expenses, including taxes and the cost of main-
14 taining its property devoted to the service. Passenger fares only are involved.

The main line of the traction company, which is double tracked, extends along the Ohio River from Vanport, Pa., west to the Pennsylvania-Ohio State line, hereinafter referred to as State Line, thence in a general southerly direction to Steubenville, Ohio, a total

distance of 40.2 miles. Of this trackage 11.4 miles are in Pennsylvania and 28.8 miles in Ohio. The line passes through various cities, townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio.

The traction company was formed in 1917 by the consolidation and merger of the Steubenville & East Liverpool Railway & Light Company, which owned and operated an electric railway from a point in Steubenville to the boundary line between Columbiana and Jefferson Counties; the East Liverpool Traction & Light Company, which operated an electric railway from the above-mentioned boundary line through Columbiana County to State Line, including street railways in East Liverpool and the line to Chester; and the Ohio River Passenger Railway Company, which operated an electric railway from State Line to Vanport. The main line throughout a greater part of its length is constructed upon a bench cut into the river bluffs, or is supported by embankments, in many cases requiring extensive masonry and retaining walls. It is paralleled by a line of the Pennsylvania system. Between Steubenville and Vanport there are a number of streams entering the Ohio River, necessitating expensive construction for bridges and culverts.

Beside a coal branch there are six branch lines engaged in transporting passengers, four in East Liverpool and two in Steubenville. Those in East Liverpool start from a point in the center of the city called "the diamond" and are known as (1) the Chester line, 2.5 miles, crossing the Ohio River on a steel suspension bridge 1,700 feet in length and 90 feet above the water; (2) the river line, 2.7 miles in length, paralleling the Ohio River; (3) the Pleasant Heights line, 1.52 miles; and (4) the Grandview line, 3.28 miles. Both of the latter lines are constructed upon steep grades in order to reach the upper levels on the hilltops north of the city. In City of East Liverpool, Ohio v. S., E. L. & B. V. T. Co., 51 I. C. C., 563, we approved a fare of 10 cents between East Liverpool and Chester and the fares over this branch are not here in issue. In Steubenville there are the Fourth Street and La Belle View lines, 2.29 and 2.91 miles in length, respectively. The La Belle View line is also constructed upon a steep grade. All the branch lines, except that to Chester, are single track. The main line and also the branches are, for the greater distances, upon private rights of way, but where they pass through towns and villages they are generally upon streets and highways.

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville. Passengers, however, are required to change cars at the diamond in East Liverpool. The traction company handles no baggage as such. A daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at time of hearing was about once a week. Except for this traffic to Beaver the traction

company handles only freight local to its line. No freight is handled oven the branch lines. The traction company files its tariffs with this commission, and publishes interstate passenger fares between points on its lines. It is subject to our jurisdiction. City of East Liverpool, Ohio, v. S., E. L. & B. V. T. Co., supra.

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh & Lake Erie Railroad at Beaver. It is stated that as a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport.

The interstate fares of the traction company now in effect are published in its tariffs I. C. C. No. 8. This tariff publishes, among others, fares for through service between Vanport and Steubenville and between all points on its main line both in Pennsylvania and Ohio. It contains no provision for free transfers.

A tariff naming the same scale of fares as carried in I. C. C. No. 8 was permitted to become effective September 20, 1920, by the Public Service Commission of Pennsylvania, but a similar tariff was rejected by the Public Utilities Commission of Ohio on the ground that the fares charged by the traction company in that State were regulated by municipal ordinances and franchises granted to its predecessors and therefore beyond the power of the State authorities to change. Under the terms of franchise ordinances of Wellsville and East Liverpool the traction company is prohibited from charging more than 5 cents for the transportation of passengers between the eastern limit of East Liverpool, which is State Line, and the boundary line between Columbiana and Jefferson Coun-
16 ties, which is approximately the western limit of Wellsville, a distance of 10.7 miles. In addition it is required to furnish free transfers to branch-line points in East Liverpool, except to Chester. The interstate fare from State Line to Woosters, which is also approximately at the western limit of Wellsville, a distance of 10.4 miles, is 20 cents.

By franchise ordinances of the village of Toronto the traction company is required to charge a fare not in excess of 5 cents between Fosterville and Costonia, 4.2 miles, with 13 tickets for 50 cents. These two points are between Country Club and Minors, south of the county line, and the interstate fare between these latter points is 20 cents for 7.2 miles. By franchise ordinances of Steubenville, the traction company may not charge more than 5 cents within that city, or six tickets for 25 cents, with free transfers. This was modified on April 8, 1919, so as to allow a fare of not more than 6 cents, or nine tickets of 50 cents, with free transfers. The increase was limited to expire April 8, 1921. The interstate fare

over the interurban line from the city limits of Steubenville to the end of the line at Sixth Street, 1.7 miles, is 10 cents. The interstate fare over the branch lines in Steubenville is 8 cents, except that between Crawford Avenue and Wellesley Avenue, 4.32 miles, it is 16 cents.

The interstate fare between Smiths Ferry, Pa., and Woosters, Ohio, 11.7 miles, is 25 cents, while the intrastate fare between State Line and Woosters, 10.4 miles, is 5 cents. The fare from Smiths Ferry to State Line is 10 cents and from State Line to Woosters, intrastate, 5 cents. Through passengers may therefore defeat the interstate fare to the extent of 10 cents a trip by buying tickets or tendering cash fares to and from State Line. The interstate fare from East Midland, Pa., to Country Club, Ohio, 29.7 miles, is 65 cents, while the intrastate fare from State Line to Country Club, 24.5 miles, is 40 cents. Here, also, by the use of the intrastate fare from State Line to Country Club, the interstate fare may be defeated to the extent of 10 cents. In the interurban service interstate passengers and intrastate passengers ride in the same cars and over the same rails.

In the following table interstate interurban fares between representative Ohio points on the traction company's line, provided in tariff I. C. C. No. 8, are stated with earnings per mile thereunder. These are compared with the fares and earnings under the intrastate scale between the same points.

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From—	To—	Distance.	Interstate.		Intrastate.	
			Fare.	Earnings per passenger-mile.	Fare.	Earnings per passenger-mile.
		Miles.	Cents.	Cents.	Cents.	Cents.
State Line	East Liverpool (terminal)	3.8	10	2.63	5	1.31
Do	East Liverpool (diamond)	4.1	15	3.66	5	1.22
Do	Woosters (western limit of Wellsville).	10.4	20	1.92	5	.48
Woosters	Kountz	3.9	10	2.56	5	1.28
Steubenville (city limits).	Country Club	2.6	10	3.84	5	1.92
Country Club	Jeddo	3	10	3.33	10	3.33
Jeddo	Myers' Lane	2	10	5	5	2.5
Myers' Lane	Minors	2.2	10	4.54	10	4.54
State Line	Steubenville (city limits)	27.1	60	2.21	45	1.66
Do	Steubenville (Sixth Street)	28.8	65	2.26	51	1.77
Country Club	East Liverpool (diamond)	20.4	50	2.45	40	1.96
Myers' Lane	State Line	19.5	45	2.3	35	1.79

The lower intrastate fares have had the effect of practically denying to the traction company the use of its interstate fares. For example, the through interstate fare from Vanport to the terminus of the line at Sixth Street, Steubenville, 40.2 miles, is 90 cents. A pas-

senger boarding a car at Vanport and stating his destination as State Line will pay a fare of 30 cents; he can then pay an intrastate fare of 51 cents from State Line to Steubenville, thus defeating the interstate fare by 9 cents. The interstate fare from Vanport to Woosters is 45 cents. A passenger stating his destination as State Line can pay 30 cents to that point and then the intrastate fare of 5 cents to Woosters, defeating the interstate fare by 10 cents. The same relative situation exists going in the reverse direction from Steubenville, and examples could be multiplied.

It is to be noted that between points in Ohio on the traction company's line where fares are not held down by municipal franchises and ordinances the intrastate and interstate fares are more nearly on a parity. For example, between Country Club and Jeddo, 3 miles, and between Myers' Lane and Minors, 2.2 miles, the intrastate fares are the same as the interstate, 10 cents; also between the city limits of Steubenville and Jeddo, 5.6 miles, the intrastate fare is 15 cents, the same as the interstate fare.

In the interurban service between Vanport and Steubenville and intermediate points the fares increase 5 cents for each zone. The minimum fare provided in the interstate schedule is 10 cents. This is not, strictly speaking, a minimum fare, although usually so designated in the record, but is in fact an initial fare and by the manner in which it operates results in the collection of an additional amount of 5 cents. For illustration, three 5-cent zones are included from State Line to Woosters, but by reason of this initial fare a
18 passenger boarding an interurban car at State Line for Woosters pays a fare of 20 cents. If this were a minimum charge the fare would be 15 cents. A minimum fare of 10 cents in interurban service appears to be reasonable and has been approved in numerous instances by the Public Service Commission of Pennsylvania and the Public Utilities Commission of Ohio, but no sufficient justification has been shown on this record for the collection of this amount as an initial fare; provided, however, that this is not to be construed as requiring the maintenance of any interstate fare between points on the traction company's line lower than the intrastate fare contemporaneously maintained between the same points.

The traction company also maintains a local interurban service between State Line and Woosters, the western limits of Wellsville, 10.4 miles, operating through the city of East Liverpool, East Liverpool Township, and Wellsville. The present intrastate fare for this service, as hereinbefore stated, is 5 cents, with free transfers to branch-line points in East Liverpool. This fare yields less than 5 mills per mile. Under its tariff I. C. C. No. 8 the traction company divides this local service into three zones: (1) State Line to diamond in East Liverpool, 4.1 miles; (2) diamond to Kountz, 2.4 miles; (3) Kountz to Woosters, 3.9 miles. An interstate fare of 5 cents is provided for each zone with no transfers. For these respective distances this 5-cent fare yields per passenger-mile revenues of 1.22, 2.08, and 1.28 cents. A 5-cent fare, therefore, for each of these zones

would appear amply justified. The evidence shows that because of the lower intrastate fare the interstate local fares are defeated and the traction company has seldom been able to derive any benefit from them. For example, the interstate fare from Vanport to Woosters is 45 cents. A passenger boarding a car at Vanport with Woosters as his intended destination, by paying the fare of 30 cents to the State Line and then the local intrastate fare of 5 cents to Woosters, effectually evades the payment of the interstate fare from Vanport to Woosters as well as the interstate fare from State Line to Woosters. There is considerable traffic on this local division, the number of revenue passengers for the year ended December 31, 1920, being shown as 3,227,652.

The intrastate fare in effect over the city or branch lines above referred to is 5 cents, except when transfers are used. The interstate fare is 8 cents, except that between Crawford Avenue and Wellesley Avenue, in Steubenville, as above shown, it is 16 cents.

The traction company asserts that because of the low intrastate fares it is unable to secure sufficient revenue to pay the cost of operating and maintaining its railway and taxes thereon; that its bond interest is in default of payment for more than a year; and
19 that the costs of the railway are continually increasing. It is shown that the line in many respects is in a run-down condition. Many bridges and trestles should be immediately repaired or renewed, but the company is unable to remedy this condition because of lack of funds. It has sought relief from the several Ohio municipalities which control the intrastate fares, also from the Ohio Legislature, but without avail. It is averred that unless relief is granted by this commission by removing the unjust discrimination complained of by raising the intrastate fares to the level of the interstate fares it will be compelled in the near future to discontinue its functions as an interstate carrier.

The following table summarizes the results of operation for the years 1918, 1919, and 1920:

	1918	1919	1920
Income	$770,167.50	$840,600.62	$949,171.49
Operating costs	601,980.59	725,893.91	865,997.12
Net income	168,186.91	114,706.71	83,174.37
Taxes	53,932.99	58,841.96	66,441.94
Net income less taxes	114,253.92	55,864.75	16,732.43
Interest on bonds	74,150.00	74,150.00	74,150.00
Interest on unfunded debt		4,650.00	
Interest on deposits	3,705.10	6,173.93	4,799.24
Surplus	43,809.02	*def. 16,761.32*	*def. 52,618.33*

Interest on bonds has not been paid since November, 1919. Wages of conductors, motormen, and trainmen increased from $148,841.25 in 1918 to $162,057.99 in 1920 and $197,522.49 in 1921, and during

those years the cost of power purchased more than doubled, increasing from $60,606.01 in 1918 to $114,196.20 in 1919, and again to $134,613.14 in 1920.

The freight earnings reported in the traction company's annual reports under express were in 1919, $14,864.79 and in 1920, $23,018.09. The evidence indicates that these freight revenues exceed the freight operating expenses.

The traction company also submitted statements of passenger earnings on various portions of its system, but in preparing these figures it charged to passenger traffic the entire operating expenses of the line. In the city of Steubenville, during the year 1920, the passenger earnings, less operating expenses, were $20,821.65 on the interurban line, $3,759.57 on the Fourth Street line, and $4,216.18 on the La Belle View line; a total of $28,797.40. Between Fosterville and Costonia there was a deficit of $5,725.20, and south of the county line the interurban line earned an excess of $17,491.36 over operating costs. Between the State and county lines there was a deficit of $53,862.89, of which $38,757.42 was on the main line. The only branch line in the city of East Liverpool showing a profit was the Chester line. It earned a profit in Ohio of $5,107.75, and in West Virginia of $18,882. The total number of passengers handled on the entire line during the year 1920 was 10,720,707.

Evidence offered by the Ohio municipalities shows that certain relief has been offered to the traction company, but that the company has refused to accept it. The traction company shows that whatever relief has been offered has always been accompanied with such further restrictions as to make its acceptance of doubtfull value; and that, as a result of the interlocking nature of the franchises and ordinances of the different municipalities, it is practically impossible to get them in agreement on any measure of relief.

It is contended by the municipalities (a) that jurisdiction does not lie in this commission to alter the fares fixed by ordinance or franchise; and (b) that the merger of electric railways originally performing purely intrastate and principally city street-car service into the present operating company does not change their original status. As to the latter contention, it is sufficient to say that whatever may have been the original service afforded by the respective railways at the time of the merger, the traction company now is carrying on much more than a street-railway business. In its interurban operations it now assumes the status of an electric railway, and as such it is engaged in interstate transportation.

As to the first contention: There is not encountered here the usual assumption on the part of the State of jurisdiction over such service, the State of Ohio not having withdrawn from municipalities the franchise privilege and power over highways. There is encountered, however, an exceptional assumption of extraterritorial jurisdiction by municipalities. While under the Omaha street-railway decision, Omaha & C. B. St. Ry. Co. v. Interstate Commerce Com-

mission, 230 U. S. 324, it may consistently be argued that this commission has no jurisdiction over a city street-car line and may not impose rates and conditions for local service other than those stipulated in a franchise, it is not seriously to be contended that the Federal Government in its efforts to maintain facilities of interstate communication and to prevent discrimination is to be prevented by municipalities which, in franchises involving the use of their local streets, assume to regulate the rates to be charged to and between other cities; and particularly when such franchises impose rates which, under present conditions, obviously are unjust and which menace maintenance of interstate transportation facilities and service.

We are not satisfied on this record that we are warranted in disturbing the intrastate basis of fares now in effect on petitioner's branch or city lines, nor are we convinced that the issuance of
21 transfers as now in effect intrastate is unreasonable in connection with fares for interstate travel, provided, however, that such transfers to the interurban line between Vanport and Steubenville, or to local cars operating between State Line and Woosters, should be valid for transportation over one zone only.

We are of opinion and find, subject to the reservations above noted with respect to the initial fares, fares on branch or city lines, and the issuance of transfers, that the interstate passenger fares of the traction company between Vanport and Sixth Street, Steubenville, and intermediate points, and designated as "through service rates" in its tariff I. C. C. No. 8, and the interstate passenger fares between East Liverpool (State Line) and the diamond in East Liverpool; between the diamond and Kountz; and between Kountz and Woosters, as published in the traction company's tariff I. C. C. No. 8 among its list of rates designated "local service rates," are just and reasonable interestate fares for the respective services between those points; and that the maintenance of intrastate fares between the same points lower than the just and reasonable interstate fares has resulted and will result in undue prejudice to persons traveling in interstate commerce over the traction company's lines in the State of Ohio and between points in the State of Ohio and points in the State of Pennsylvania; in undue preference of and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the traction company under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger fares not less than the interstate passenger fares herein found reasonable; provided, however, that the fares herein authorized are for application in connection with through travel, irrespective of municipal limits, on the interurban operations of petitioner,

and nothing herein is to be construed as authorizing any change in the fares as now in effect on the traction company's line for transportation of passengers who begin and end their journey within the limits of any municipality.

An appropriate order will be entered.

COMMISSIONERS AITCHISON, EASTMAN, POTTER, AND CAMPBELL dissent.

22 Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1921.

No. 12092.

Ohio and Pennsylvania rates, fares, and charges.

In the matter of rates, fares, and charges of the Steubenville, East Liverpool & Beaver Valley Traction Company within the States of Ohio and Pennsylvania.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the Steubenville, East Liverpool & Beaver Valley Traction Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the State of Ohio found in said report to be just and reasonable for the future.

It is further ordered, that this order shall take effect on or before January 6, 1922, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

23 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss.

Filed Dec. 29, 1921.

United States of America, by its counsel, now comes and moves the court to dismiss the bill of equity filed against it in the above-entitled cause.

As grounds for this motion it is shown—

1. The plaintiff is without interest in the controversy and has no standing in this court to maintain the bill.

2. The bill is without equity on its face and does not state any cause of action against the United States.

Wherefore, defendant prays that its motion be sustained.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. S. WERTZ,
United States Attorney.

24 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss.

Filed Dec. 29, 1921.

The defendant, The Steubenville, East Liverpool, and Beaver Valley Traction Company, by its counsel, now moves this honorable court that the bill in equity herein be dismissed for the reason that the same on its face is without equity in the premises and states no cause of action against this defendant.

Wherefore, the defendant, The Steubenville, East Liverpool, and Beaver Valley Traction Company, prays that the bill be dismissed.

AGNEW HICE, TOLLES, HOOSETT, GINN & MORLEY,
Counsel for The Steubenville, East Liverpool, and Beaver Valley Traction Company.

25 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of the Interstate Commerce Commission.

Filed Dec. 29, 1921.

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of

exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering the allegations contained in the bill of complaint, this intervening defendant, which for convenience will be referred to hereinafter as the commission, admits and alleges that defendant The Steubenville, East Liverpool and Beaver Valley Traction Company is a common carrier by railroad engaged in the transportation of passengers and property from points in one State to points in another State; that, upon petition by said defendant alleging that the observance by it of various franchise ordinances and regulations imposed by the authority of the States of Ohio and Pennsylvania causes and results in undue and unreasonable preference and advantage to intrastate commerce, to the undue and unreasonable prejudice and disadvantage of interstate commerce, and results in unjust
26 and unreasonable discrimination against interstate commerce, the commission, on January 10, 1921, instituted an investigation, docketed as No. 12092, to determine, among other things—

* * * the reasonableness of petitioner's interstate rates, fares, and charges as shown in said I. C. C. No. 8, and whether the rates, fares, and charges required by authority of the States of Ohio and Pennsylvania to be maintained by said petitioner cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce * * *.

The commission further alleges that copies of the order of investigation and of the notice assigning the case for hearing were sent, by registered mail, among others, to the Governor of Ohio, the Governor of Pennsylvania, the Public Service Commission of Pennsylvania, the Public Utilities Commission of Ohio, and to the mayors of East Liverpool, Ohio, Wellsville, Ohio, Toronto, Ohio, Steubenville, Ohio, Glasgow, Pa., and the county clerk, County of Columbiana, Lisbon, Ohio; that the full hearing provided for in section 13 of the interstate commerce act was accorded to all interested parties; that at said hearing a large volume of testimony and other evidence, bearing upon the matters under investigation, was submitted to the commission for consideration; that subsequently the questions presented for decision were fully argued, both orally and in briefs, and the matters and things involved in said case were submitted to the commission for determination, whereupon, on November 7, 1921, the commission determined said questions and made its report, findings, and order in said docket No. 12092, Ohio and Pennsylvania Rates, Fares, and Charges, 64 I. C. C. 517, which

are attached hereto, marked Exhibit A, and are hereby referred to and made a part hereof.

The commission further alleges that said findings were and are and each of them was and is, fully supported and justified by the record before the commission in said proceeding.

The commission further alleges that in making said report,
27 findings, and order it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by the allegations in the petition herein. The commission further alleges that said report, findings, and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; and that in making them it did not exceed the authority which was duly conferred upon it, or exercise that authority in an unreasonable manner.

II.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the bill herein in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact included in the commission's said report, findings, and order.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
By WALTER MCFARLAND, *Counsel.*

P. J. Farrell.
(Signed) P. J. FARREL,
Of Counsel.

[Affidavit of C. C. McChord to above paper omitted in printing.]

28 EXHIBIT A to Answer.

[Omitted, printed side p. 13.]

41 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of The Steubenville, East Liverpool and Beaver Valley Traction Company.

Filed Jan. 12, 1922.

For answer to the bill of complaint in this case, this defendant, The Steubenville, East Liverpool and Beaver Valley Traction Company, says:

First. It is admitted that the city of Wellsville, Ohio, is a municipal corporation duly organized under the laws of the State of Ohio, and that the same is located in territory under the jurisdiction of the court in which this suit is pending.

Second. It is admitted that The Steubenville, East Liverpool and Beaver Valley Traction Company is a corporation duly organized under the laws of Ohio, but it is also averred that it is a corporation duly organized and existing under the laws of the State of Pennsylvania, and that the same was formed by the lawful merger under the laws of Ohio and the laws of Pennsylvania of three corporations, to-wit: The Steubenville, East Liverpool Railway and Light Company, The East Liverpool Traction and Light Company, both of which were corporations of the State of Ohio, and The Ohio River Passenger Railway Company, a corporation of the State of Pennsylvania, and it is admitted that The Steubenville, East Liverpool and Beaver Valley Traction Company is a common carrier of passengers for hire, but it is averred that it is also a common carrier of light freights, and it is further averred that it is
42 such carrier of passengers and freights both intrastate in the States of Pennsylvania, Ohio, and West Virginia, and also interstate between the aforesaid States of Ohio, Pennsylvania, and West Virginia.

Third. It is admitted that the United States of America is made defendant in this action by and under authority of certain provisions of the statutes of the United States of America.

Fourth. It is denied that the defendant, the traction company above named, owns and operates an electric street railway from the western boundary line of the city of Wellsville, Ohio, to the eastern boundary line of the city of East Liverpool, Ohio, a distance of about ten miles, all of which lines operate over and upon the streets of East Liverpool and Wellsville, Ohio, but it is averred that the defendant, the traction company above named, owns and operates as a part of its interurban interstate electric railway an electric railway operating from the western boundary line of the city of Wellsville to the eastern boundary line of the city of East Liverpool, which is a distance of about eleven miles, and that its line between said points is operated over and upon certain streets in the city of East Liverpool and certain streets in the city of Wellsville, and upon a certain public road in East Liverpool Township not within the corporate limits of either of said cities and also upon certain private rights of way within the city of East Liverpool; and also within the township of East Liverpool, and not within the limits of either of said cities.

Fifth. It is denied that the distance from the business center of Wellsville, Ohio, to the business center of East Liverpool, Ohio, is a distance of about four miles, and that all of its right of way is paved except the part owned by defendant for a private right of way. A part of this right of way is over the country road
43 leading from Wellsville to East Liverpool; that the greater part of the inhabitants of the city of Wellsville and East

Liverpool are carried each day over the lines of said traction company to their work in factories or stores located in the other city, and are carried to and from their work on the lines of the said defendant, the traction company above named, and all the inhabitants of both Wellsville and East Liverpool and the suburbs of said cities are dependent upon the said street car line for transportation, but it is averred that the distance from the business center of the city of Wellsville to the business center of the city of East Liverpool is about six miles, and that a part of said distance where said tracks are located upon public highways is paved, and it is further averred that there is no pavment upon the private rights of way owned by said traction company, and it is admitted that for a part of the aforesaid distance said traction company's line is over the county road leading from Wellsville to East Liverpool, but it is averred that some part of the inhabitants of the city of Wellsville and of the city of East Liverpool, but by no means the greater part of said inhabitants, are carried each day over the lines of said traction company to their work, and it is further averred that there is a considerable number of inhabitants of each city who are employed in factories or stores located in the other city, and that some of such inhabitants are carried to and from their work on the lines of this defendant, and it is averred that the inhabitants of both Wellsville and East Liverpool and the suburbs of said cities are dependent upon said interurban interstate electric railway for transportation to the extent to which they may require such transportation.

Sixth. This defendant denies the allegation made in said bill of complaint that the line of said street railway was first constructed and operated in the year 1892, and in order to construct said
44 lines Albert M. Johnson, Sidney H. Short and C. E. Grover applied to the council of the city of Wellsville, Ohio, for a franchise to construct such line over the streets of said city, and denies that on September 14, 1891, at their request the council of the city of Wellsville, Ohio, duly adopted an ordinance, which ordinance was duly accepted by the said plaintiff, and denies by the terms of said ordinance said parties and their legal successors in title were given the right to construct, maintain, and operate for a period of twenty-five years an electrical street railway over certain streets in said city, and denies that said ordinance further provided that a fare of five cents should be charged for each passenger over the whole or any part of said railway or any extension of the same, and that said franchise ordinance further provided that said grantees should place good and sufficient cars upon said line and run them as often and at such rate of speed as public convenience may demand or as council of said city might require.

And it is further denied that to extend said railway over the streets and roads of Wellsville to and through the streets of East Liverpool, said Johnson, Short, and Grover obtained, at about the date of said franchise from the city of Wellsville, a franchise from the county

commissioners of Columbiana County to construct said railway from the easterly corporation line of Wellsville to the westerly corporation line of East Liverpool, and it is denied that they also on or about said date obtained a franchise from the council of the city of East Liverpool, Ohio, giving them and their successors and assigns the right to construct an electric street car line from the westerly corporation limit of said city to the easterly corporation line thereof and to use the streets of said city for such purpose, but it is averred that the line of railway of this defendant referred to in said bill of complaint as extending from the westerly corporation line of the city of Wellsville to the easterly corporation line of the city of East Liverpool was not built in the year 1892, and it is further

45 averred that upon application of Albert M. Johnson, Sidney H. Short, and C. E. Grover certain rights were obtained from the city of Wellsville for the construction and operation of an electric railway on certain streets in said city of Wellsville, and that subsequently the said persons or their successors at various and divers times obtained additional rights by ordnance from the city of Wellsville and by resolution from the county commissioners of the county of Columbiana, and by ordinance from the city of East Liverpool under which and in pursuance of which this defendant now operates its electric railway from the western corporation limit of the city of Wellsville to the eastern corporation limit of the city of East Liverpool, which electric railway is a part of the main line of the electric railway of this defendant which extends from Sixth Street in the city of Steubenville in the county of Jefferson and State of Ohio to a point called Vanport in Borough Township in the county of Beaver and State of Pennsylvania, a distance of 40.2 miles, and it is admitted that the franchise ordinances of said city of Wellsville and of the city of East Liverpool and the resolutions of the Board of County Comissioners of the County of Columbiana fixed a fare of five cents to be charged for each passenger being carried over said railway of defendant from the western corporation line of Wellsville to the eastern corporation line of East Liverpool or any part thereof, but it is averred that other portions of the street railway system of the defendant within the limits of the city of East Liverpool, namely, the river line, the Pleasant Heights line, and the Grandview line, as well also the line extending from the city of East Liverpool to the city of Chester in the county of Hancock and State of West Virginia, were constructed in pursuance of rights granted by other ordinances of the city of East Liverpool.

Seventh. It is denied that in pursuance of said franchise so

46 obtained from the said cities of Wellsville and East Liverpool and the county commissioners of Columbiana County the said Johnson, Grover, and Short built and operated an electric street car line over and through said cities and over said public road, if it is thereby meant that the road built by said Johnson, Grover, and Short was coextensive with and located as the line of this defendant from

the westerly corporation line of Wellsville to the easterly corporation line of East Liverpool is now located and operated.

Eighth. It is admitted that in pursuance of the ordinances and franchises granted by the city of Wellsville and the city of East Liverpool the rate of fare for each passenger over the entire route or any part thereof was fixed at five cents, but as to whether before the construction of said street railway the grantees accepted the provisions of said ordinance in writing or not is unknown to this defendant and is therefore denied, and if material to the issues tendered by the bill proof therof is demanded.

Ninth. It is admitted that at some time, but whether on the 19th day of November, 1901, or not this defendant has no knowledge, the rights of the said Johnson, Grover and Short became vested in the East Liverpool Railway Company, and that the city of Wellsville passed an ordinance granting to the last named company the right to construct, maintain, and operate an electric railway on the streets of said city from Eighteenth Street to the southern line of Clark Avenue in the said city, and it is admitted that one of the provisions of said ordinance was that said grant should be for a period of twenty-five years and the rate of fare should be five cents for each passenger carried over the line as operated in the said cities of Wellsville and East Liverpool, and between said cities or on any extension thereof, and that said ordinance stipulated that said company should run good cars as often as required for public convenience or by the city council, and it is admitted that said
47 franchises provided that the rights granted to Johnson, Grover and Short and all the terms of said ordnances granting such rights should become apart of the ordinance granting rights to said corporation last named, but whether said ordinance was by said company accepted in writing is unknown to this defendant, and is therefore denied, and should the same be deemed material to the issues tendered by the bill proof thereof is demanded, and it is admitted that under the last mentioned ordinance the said East Liverpool Railway Company extended its lines.

Tenth. It is admitted that the council of the city of Wellsville on the 19th day of September, 1905, passed Ordinance No. 594 and extend the franchises granted thereby for a period of twenty-five years, and that said ordinance provided that the rate of fare over the entire line from the western limits of the city of Wellsville to the eastern limits of the city of East Liverpool should be five cents for each passenger, but whether said ordinance was accepted in writing this defendant has no knowledge and therefore denies the same, and if such written acceptance is deemed material for the issues tendered by the bill proof thereof is demanded.

Eleventh. It is denied that on the day of , 1916, this defendant, the Steubenville, East Liverpool and Beaver Valley Traction Company, purchased or acquired all the rights and property and franchises of the East Liverpool Railway Company in the cities of Wellsville and East Liverpool and from the county commis-

sioners of Columbiana County, and it is denied that in the year 1905 this defendant built an interurban line of electric railway from Steubenville, Ohio, to the western corporation line of Wellsville, Ohio, where it connected with the line of railway operated under said franchises from Wellsville to the easterly line of East Liverpool, Ohio, but it is admitted that the cars operated by this defendant from Steubenville, Ohio, to East Liverpool, Ohio, are the same cars
48 operated over streets within the cities of Wellsville and East Liverpool and are operated under ordinances passed by said cities or some of them.

Twelfth. It is denied that in the year 1905 or at any other time the Beaver Valley Traction Company built a line of electric railway from Beaver in the State of Pennsylvania to the easterly corporation line of East Liverpool, Ohio, and ran its interurban cars by electricity from the eastern corporation line of East Liverpool, Ohio, over the tracks of the East Liverpool Railway Company, and denies that the East Liverpool Traction and Light Company owned by the East Liverpool Railway Company, and said East Liverpool Traction and Light Company in 1905 operated its line from the eastern limits of East Liverpool to the western limits of Wellsville, Ohio, and denies that said three companies continued so to operate over their respective lines until the defendant, the traction company, about the year 1916 acquired by merger all three of said lines, and it is denied that on the day of , 1916, this defendant by said merger acquired the control and use of said car lines and said franchises in and between the cities of East Liverpool and Wellsville, Ohio, and has since said date operated the same under said franchises, and denies that said defendant has no other franchises or right so to occupy the streets of said cities or the highway between said cities except such right as is granted in and by said franchise ordinance of said cities and said county commissioners.

It is admitted that the last grant made by the city of Wellsville, Ohio, and accepted by the predecessors in title or some of them to this defendant and now owned by this defendant was granted by the council of said city of Wellsville, September 19th, 1905, being Ordinance 594, and that said ordinance provides in Section II thereof

"That it is one of the conditions of this ordinance and one of the conditions of this grant for the use of said streets for a double track that grantee or its successors shall charge for a fare
49 the sum of five cents for each passenger carried over the entire route from the western corporation line of Wellsville to the State line between Ohio and Pennsylvania or any part thereof, but policemen and regularly paid firemen of said city, when in uniform, shall be carried free."

And it is averred that the Steubenville, East Liverpool and Beaver Valley Traction Company was created on the 1st day of November, 1917, by the lawful merger under the laws of the States

of Ohio and Pennsylvania of three corporations, namely: The Steubenville and East Liverpool Railway and Light Company, the East Liverpool Traction and Light Company, both being corporations of the State of Ohio, and the Ohio River Passenger Railway Company, a corporation of the State of Pennsylvania, and it is further averred that by virtue of said merger all of the electric railways and properties of said three corporations and their corporate franchises and municipal grants and rights became vested in and the property of said merged corporation, the Steubenville, East Liverpool and Beaver Valley Traction Company.

Thirteenth. It is admitted that the easterly corporation line of the city of East Liverpool is the State line between the States of Ohio and Pennsylvania.

Fourteenth. Answering the averment of the bill of complaint that "by the laws of Ohio any such traction company is forbidden to charge any greater rate of fare than that stipulated in any such franchise ordinance so passed by the proper authority of a city or county and duly accepted by any such traction company," this defendant avers that it is asserting its rights herein under the acts of Congress of the United States providing for the regulation of interstate commerce and by virtue of the orders of the Interstate Commerce Commission of the United States made in pursuance thereof, any laws of the State of Ohio to the contrary notwithstanding.

Fifteenth. Defendant denies the averments of said bill that on or about April 12, 1921, it filed an application before the Interstate Commerce Commission, but avers that on or about
50 the day of , 1920, it filed its petition with the Interstate Commerce Commission, which was entered as number 12092 on the docket of said commission, copy of which petition is hereto attached, marked Exhibit "A" and made a part hereof, and further avers that after notice to plaintiff and full hearing said commission upon due consideration made and entered its report and order in the premises on the 2nd day of November, 1920, copy of which report and order is hereto attached, marked Exhibit "A" and made a part hereof.

Sixteenth. This defendant denies the averment contained in the bill of complaint, which reads as follows:

"This plaintiff avers that the said act of Congress, known as the transportation act of 1920, does not confer or grant nor purport to confer or grant the authority claimed by these defendants, but if it does purport to grant such authority then and in that event the plaintiff avers that said transportation act in so far as it attempts to confer such authority is unconstitutional, void, and unenforceable, because it would in that event deprive the State of Ohio of its police power expressly reserved to it by article 10 of the Constitution of the United States and would deprive the plaintiff and its citizens of property without due process of law and would deprive plaintiff of its right to enter into a franchise contract with any

corporation and would set aside valid and binding contracts without due process of law."

Seventeenth. The averments of the plaintiff, to wit:

"Plaintiff and its officers and employees in the discharge of their duties are obliged to and do travel over the lines of said traction company as passengers and the fares charged therefor by said traction company, defendant herein, are paid by plaintiff from public funds, and that is the increased rated which defendants are to put into effect as herein complained of are charged such officers and employees, such increase will be paid by plaintiff and its public funds are thus used and lost."

are not within the knowledge of this defendant and are therefore denied by it, and if the same are material to the issues tendered by the bill this defendant demands that proof thereof be made, but avers that if such officers and employees do so travel they will be required to pay the lawful fare, and it is denied that the funds so paid will be lost.

Eighteenth. The averments of the plaintiff, to wit:

51 "That the city of Wellsville, Ohio, has a population of about nine thousand and the city of East Liverpool has a population of about twenty-five thousand, and that there are about fifteen thousand persons in the territory surrounding said cities, all of whom are dependent upon the lines of said traction company for transportation and all of whom do use said lines."

are not within the knowledge of this defendant and are denied, and if material to the issues of the bill proof thereof is demanded.

Nineteenth. This defendant denies the allegations of the plaintiff's bill, to wit:

"That said defendants are threatening to and will, unless restrained by this court, put into operation in Ohio and on the lines of said street railway rates and fares far in excess of the lawful rates and fares for the transportation of persons and property within the State; that during the year 1920, 3,227,652 persons were so carried over said line, all of whom paid fare as passengers, and there are at least that many persons that still use said lines as passengers, and if compelled to pay such rate of fares as proposed the people of the State of Ohio and of said cities and its suburban territory will be deprived of thousands of dollars in value and of their rights without due process of law, which will result in great disorder from resistance to such rate so proposed, and in a multiplicity of suits both criminal and civil, and will ignore and deprive the State of its constitutional powers and of its police power to its irreparable damage, and will result in the taking away of the right of plaintiff to enforce its valid contracts, to the irreparable damage to the State of Ohio and to plaintiff and said State and plaintiff, and the citizens so affected are without any adequate remedy at law."

and this defendant avers that the order of the Interstate Commerce Commission hereinbefore set forth was put into effect and operation on the 25th day of December, 1921, and that there occurred no disorder or resistance whatever and that no suits, either criminal or civil, have been instituted with respect thereto (saving always the bill in equity, to which this answer is now filed).

Wherefore this defendant prays that it may go hence and recover its costs herein expended.

THE STEUBENVILLE, EAST LIVE'POOL AND BEAVER VALLEY TRACTION COMPANY,
By J. H. MAXWELL, *President.*

52 [Affidavit of J. H. Maxwell to above paper omitted in printing.]

53 *Exhibit "A" to foregoing answer.*

Before the Interstate Commerce Commission.

Docket No. ——.

In the matter of rates, fares, and charges of the Steubenville, East Liverpool & Beaver Valley Traction Company within the States of Ohio and Pennsylvania.

To the Honorable Interstate Commerce Commission:

The petition of the Steubenville, East Liverpool & Beaver Valley Traction Company respectfully shows:

I.

That the Steubenville, East Liverpool & Beaver Valley Traction Company is a corporation of the States of Ohio and Pennsylvania, having its principal office in the State of Ohio, in the city of East Liverpool, in the county of Columbiana, in said State, and its principal office in the State of Pennsylvania, in the Borough of Midland, county of Beaver, in said State, which said The Steubenville, East Liverpool and Beaver Valley Traction Company was formed by the lawful merger under the laws of the States of Ohio and Pennsylvania of the properties, rights, and franchises of the Steubenville and East Liverpool Railway and Light Company, the East Liverpool Traction and Light Company (both of said corporations being corporations of the State of Ohio), and the Ohio River Passenger Railway Company (a corporation of the State of Pennsylvania), said traction company being also legally authorized to carry on business in the State of West Virginia, and is a common carrier engaged in interstate and intrastate transportation of passengers and property and as such common carrier is subject to the act to regulate commerce approved February 4, 1887, and of the acts amenda-

54 tory thereof and supplementary thereto.

II.

That the Steubenville, East Liverpool and Beaver Valley Traction Company owns and operates an interstate electric railway extending from a point in the township of Borough, in the county of Beaver, and State of Pennsylvania, commonly called Vanport, to a point on Market Street, in the city of Steubenville, county of Jefferson, and State of Ohio, with a branch extending from a point in the city of East Liverpool, State of Ohio, commonly called the diamond to the city of Chester, in the county of Hancock, and State of West Virginia. The route of said electric railway is more particularly described as follows: Beginning at the point called Vanport heretofore mentioned, extending westward through the township of Industry, the borough of Midland, the township of Ohio, the borough of Glasgow, and again the township of Ohio to the Ohio and Pennsylvania State line, said route being practically parallel with the Ohio River, and from the Ohio-Pennsylvania State line, which is also the line of the city of East Liverpool, through the city of East Liverpool, the township of Liverpool, the city of Wellsville, all in the county of Columbiana and State of Ohio, to the line of the county of Jefferson in said State of Ohio, the route of said line from Pennsylvania State line to the Jefferson County line being substantially parallel with the Ohio River, and from the Jefferson County line aforesaid through Saline Township, Knox Township, the village of Empire, the city of Toronto, Island Creek Township, and the city of Steubenville, all in the county of Jefferson, aforesaid, the route in the county of Jefferson being substantially parallel with the Ohio River, and also a branch line extending from a point in the city of East Liverpool, formerly referred to as the diamond, and crossing the Ohio River upon a bridge to the city of Chester in the county of Hancock and State of West Virginia, and through said city substantially parallel with the Ohio River. In addition to the
55 main lines above described, the Steubenville, East Liverpool and Beaver Valley Traction Company has three branch lines in the city of East Liverpool, one known as the river line and running along the Ohio River, one known as the Pleasant Heights line, and another known as the Grandview line, both of the last mentioned lines being extensions northward in said city of East Liverpool, and the said The Steubenville, East Liverpool and Beaver Valley Traction Company has also two branch lines in the city of Steubenville, one known as the La Belleview line and the other as the Fourth Street line. The lines thus described comprise about 100 track miles. The main line from Vanport to Steubenville is 40.2 miles in length, and the main line from East Liverpool to Chester is 2.5 miles in length; the said main line from Vanport to Steubenville and the said Chester branch are double track railways.

Much of the lines of said electric railway in the States of Pennsylvania, Ohio, and West Virginia is constructed upon private rights of way, but in the cities and villages traverses public high-

ways or streets, and the line to Chester crosses the Ohio River on a steel suspension bridge about one-third mile in length, which is owned by said traction company.

The said electric railway is operated by power purchased from the Buckeye Power Company, a corporation of the State of Ohio.

The said electric railway has at East Liverpool and at Steubenville sufficient car barns, machine shops and repair shops, and the necessary offices, and the said railway is equipped with cars sufficient to provide for its operation for the accommodation of the public for interstate as well as intrastate traffic. That the various cities, villages, and counties of the State of Ohio mentioned herein are duly organized and constituted under the constitution and laws of the said State of Pennsylvania.

III.

56 Your petitioner further represents that the value of its property devoted to its transportation service and used and useful therein exceeds six and one-half million dollars ($6,500,000); that it has an authorized issue of first mortgage thirty year five per cent sinking fund gold bonds in the amount of $3,000,000, $1,483,000 in which have been issued and are outstanding its common capital stock to the amount of $2,000,000 par value and five per cent cumulative preferred stock to the amount of $2,600,000 par value.

IV.

The railway of the Steubenville, East Liverpool and Beaver Valley Traction Company in the State of Pennsylvania has been constructed, and is operated by virtue of its corporate franchises granted by the State of Pennsylvania, and also by virtue of the consents of the various townships and boroughs through which it passes, which townships and borroughs with the exception of the borough of Glasgow have not undertaken to impose upon said Electric Railway any regulations with respect to fares and rates to be charged. The borough of Glasgow has, however, imposed a limitation upon the fares to be charged, so that no more than five cents can be charged between the borough of Glasgow and the Ohio State line, or between the borough of Glasgow and the western boundary of Industry Township (now Eighth Street in the borough of Midland).

Your petitioner is advised that the Public Service Commission of the State of Pennsylvania has jurisdiction and power to control the intrastate rates to be charged by said electric railway in the State of Pennsylvania, including within its said control and jurisdiction the territory embraced or attempted to be embraced within the fare regulations of said borough of Glasgow.

Within the State of Ohio the said electric railway is operated to a large extent under certain franchise ordinances granted by certain

cities, counties, and villages through which said electric railway passes.

57 That the cities of East Liverpool and Wellsville and the county of Columbiana have attempted to and do *em*pose fare regulations upon said railway by which said railway is required to transport passengers from the Ohio-Pennsylvania State line to the line of Jefferson County, Ohio, a distance of eleven miles, for the sum of five cents. That the city of Toronto by its franchise ordinance has imposed upon said electric railway fare regulations by which it is required to carry passengers from a place called Fostersville to a place called Costonia, a distance of 4.2 miles, for five cents or by the purchase of tickets at the following rates: Thirteen tickets for fifty cents, or three and eight hundred forty-six thousandths cents.

The city of Steubenville by its franchise ordinance imposed regulations upon said electric railway by which its fares within the city are limited to five cents, or six tickets for twenty-five cents, with transfers, which fares, however, have been modified for a period of two years by an ordinance adopted on the eighth day of April, 1919, so that the fare during said period of two years is six cents, or nine tickets for fifty cents, with transfer.

V.

Your petitioner avers that since the formation of the Steubenville, East Liverpool and Beaver Valley Traction Company on the first of November, 1917, the labor cost for operation of the electric railway has increased substantially one hundred per cent, and the cost for materials and supplies has increased substantially from one hundred to two hundred per cent.

VI.

That on the first day of November, 1917, the Steubenville, East Liverpool and Beaver Valley Traction Company, obtained its power at a cost of seven mills per kw. h. from the Buckeye Power Company, since which time said power company has filed with the

58 Public Utilities Commission of Ohio rates greatly in excess of said seven mills per kw. h.

VII.

Your petitioner avers that the Public Utilities Commission of the State of Ohio is without power to regulate the fares to be charged by said traction company in the State of Ohio in all those districts where cities, counties, or villages have regulations with respect to fares, and that as a result there is but a small part of the lines of said traction company in the State of Ohio subject to the jurisdiction and control of the Public Utilities Commission of Ohio with

respect to fares, but to the extent of its jurisdiction said utilities commission has permitted fares to become effective which are indentical with the fares set forth in tariff I. C. C. No. 8 hereinafter referred to.

VIII.

That on the tenth day of September, 1920, the Steubenville, East Liverpool and Beaver Valley Traction Company put into effect its interstate tariff I. C. C. No. 8, and also filed with the Public Utilities Commission of the State of Ohio a tariff increasing the rates over those parts of the traction company's lines where there were no ordinance regulations created by cities and villages with respect to fares. The rates in the tariff so filed with the Public Utilities Commission of the State of Ohio are identical with the rates set forth in I. C. C. No. 8, except upon those portions of the lines within the control of the franchise ordinances of the cities, counties, and villages as hereinbefore mentioned, and the said tariff so filed with the Public Utilities Commission of Ohio is now effective.

IX.

That prior to the tenth day of September, 1920, said traction company filed with the Public Service Commission of Pennsylvania a tariff for intrastate rates in the State of Pennsylvania identical with the rates in said tariff I. C. C. No. 8, and the same has
59 become effective, but objections thereto have been filed by the borough of Glasgow, and the matters growing out of such objections are now pending before the Public Service Commission of Pennsylvania.

X.

That in those parts of the State of Ohio wherein the rates are controlled by the so-called franchise ordinances of cities, counties, and villages the intrastate rates are very much less than the interstate rates for the same service over the same tracks.

Thus the fare from the Ohio-Pennsylvania State line to the Jefferson County line, a distance of eleven miles, is five cents in intrastate traffic, while in interstate traffic the fare is twenty-five cents; again the fare from suspension bridge to Jefferson County line in intrastate traffic is ten cents, while the fare over the same tracks in interstate traffic is twenty-five cents; again, the fare from Costonia to Fostersville, a distance of four and two-tenths miles, is in intrastate traffic five cents, or by the purchase of tickets less than four cents, whereas in interstate traffic the same service over the same rails is fifteen cents.

So also the rate from Sixth Street, Steubenville, to the city limit of Steubenville in interstate traffic is ten cents, while in intrastate traffic the rate is five cents, or six tickets for twenty-five cents, with

transfer, or under the two-year ordinance hereinabove referred to, is six cents or nine tickets for fifty cents, with transfer; again, from Crawford Avenue to McNeil Corner in interstate traffic is eight cents, and intrastate traffic is five cents, or six tickets for twenty-five cents, with transfer, and under the said two-year ordinance is six cents, or nine tickets for fifty cents, with transfer; again, from Crawford Avenue to Wellsley Avenue in interstate traffic is sixteen cents, and in intrastate traffic is five cents, and six tickets for twenty-cents, with transfer, or under said two-year ordinance is six cents, or nine tickets for fifty cents, with transfer.

60 So also on the side lines in the city of East Liverpool, the rate in interstate traffic is eight cents without transfer, while in intrastate traffic the rate is five cents with transfer.

XI.

Your petitioner further represents that the rates and charges fixed by said ordinances do not and will not yield sufficient revenue to pay the cost of operating its railway in rendering the service for which said rates and charges are paid, and are therefore unjust, unreasonable, and confiscatory and constitutes an undue discrimination against and injuriously affects interstate commerce; that while it has a large volume of traffic, both passenger and freight, and both interstate, its revenues derived from the operation under said ordinances and said tariffs, State and interstate, are and will be insufficient to pay its operating expenses including taxes and the cost of maintaining its property engaged in said service, without any return on the value of its property devoted to said service; that its bond interest is in default for more than one year, and that the costs of the operation of said railway are continually increasing.

Your petitioner further represents that rates and charges for its interstate service high enough to provide additional revenue sufficient to pay the operating costs, taxes, and maintenance of its said railway without an increase of the rates and charges for its said intrastate service would but serve to increase and accentuate the present undue, unreasonable, and unjust burden upon and discrimination against interstate commerce and add to the present undue and unreasonable advantages and preferences in favor of persons and localities using said carrier in intrastate commerce.

XII.

Your petitioner further represents that to continue said intrastate rates fixed by the ordinances aforesaid will seriously impair

61 and in time wholly destroy the ability of your petitioner to continue said railway as a going concern engaged in interstate commerce and will deprive the public which it serves of the in-

terstate transportation facilities now and ever since November, 1917, furnished by your petitioner.

XIII.

Your petitioner avers that if its rates for intrastate traffic were the same as its rates for interstate traffic under said tariff I. C. C. No. 8, the income of your petitioner would be sufficient to pay its expenses for operation, maintenance, and taxes, and a sufficient amount in addition to pay a return upon its invested capital to the extent of its bonded indebtedness.

Wherefore your petitioner prays that appropriate notice of the pendency and prayer of this petition be given; that your honorable commission take note of the urgent necessities of your petitioner and hat you institute at an early date an investigation with respect to the matters and things herein set forth; that your petitioner may have such order or orders in the premises as may be just and reasonable to the end that the unjust and unreasonable discriminations complained of may be removed by causing said cities, counties, and villages to cease and desist from enforcing the restrictions upon rates and charges now imposed by them and each of them and that only such rates and fares be charged by your petitioner as your honorable commission may find and determine just and reasonable and free from unjust discrimination, and that your petitioner may have such other order or orders to which it may be found entitled.

Respectfully submitted.

THE STEUBENVILLE EAST LIVERPOOL AND
BEAVER VALLEY TRACTION COMPANY,
By J. H. MAXWELL, *President.*

East Liverpool, Ohio, 1920.

Attest by
62 GEO. H. FAULK,
Secretary.

AGNEW HICE,
Beaver, Pa., Attorney.

T. H. HOGSETT, Cleveland, and
C. R. MARSHALL, Washington,
Of Counsel.

63 *Exhibit "B" to foregoing answer.*

[Omitted, printed side p. 13.]

77 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Notice on motion for injunction.

Filed Dec. 16, 1921.

The defendants will take notice that on the 29th day of December, 1921, at 9.30 a. m., the plaintiff The City of Wellsville, Ohio, will apply to the court for a temporary injunction.

CHARLES BOYD,
City Solicitor of Wellsville, Ohio.

78 In the District Court of the United States, Northern District of Ohio, Eastern Division.

Opinion of court filed and entered March 13, 1922, by Maurice H. Donahue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

Before Donahue, Circuit Judge, Killits and Westenhaver, District Judges.

WESTENHAVER, District Judge:

This suit is the counterpart of the Village of Hubbard vs. The United States et al., this day decided. It was heard, argued, and submitted at the same time, and involves substantially similar facts and precisely the same questions of law. These questions likewise arise upon plaintiff's application for a preliminary injunction and upon motion of defendants, the United States and the Steubenville, East Liverpool & Beaver Valley Traction Company, to dismiss, and upon answer to the merits filed by the Interstate Commerce Commission setting up its order and its findings of fact. The same conclusion and judgment is required.

The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found, is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger
79 and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant, than in

the Village of Hubbard case. In the company's annual reports its gross receipts from these freight earnings are reported under express earnings. The company is not, in our opinion, subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in our opinion in the Village of Hubbard case.

The motion to dismiss will be denied. A preliminary injunction will be granted as prayed.

MAURICE H. DONAHUE,
Circuit Judge.
JOHN M. KILLITS,
D. C. WESTENHAVER,
District Judges.

80 In the District Court of the United States, Northern District of Ohio, Eastern Division.

Opinion referred to in preceding opinion of court filed and entered March 13, 1922, by Maurice H. Donahue, Circuit Judge, John M. Killits and D. C. Westenhaver, District Judges.

THE VILLAGE OF HUBBARD, OHIO, PLAINTIFF, vs. UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and The Pennsylvania-Ohio Power & Light Company, Defendants.	IN EQUITY No. 680.

Before Donahue, Circuit Judge, Killits and Westenhaver, District Judges.

WESTENHAVER, District Judge:

This suit is brought under the terms of the act of October 22, 1913 (U. S. Comp. Stat. 1916, sec. 998). Plaintiff seeks a preliminary injunction restraining the Pennsylvania-Ohio Power & Light Company from putting into effect an order of the Interstate Commerce Commission made November 7, 1921. This order requires that company to cease and desist from practicing a certain undue prejudice, preference, advantage, and unjust discrimination found by the commission to exist in the relation of intrastate and interstate passenger fares, and to establish, put in force, and maintain a certain schedule of passenger fares for the transportation of passengers in intrastate commerce between Hubbard, in the State of Ohio, and Youngstown, in the State of Ohio.

This cause has been heard, argued, and submitted upon plaintiff's application for a preliminary injunction; the motion of the defendants, the United States and the Pennsylvania-Ohio Power
81 & Light Company, to dismiss plaintiff's bill; and upon the merits as affecting plaintiff's right to relief, as they arise upon an answer filed by the Interstate Commerce Commission. The motion to dismiss is on two grounds: (1) that plaintiff is without

interest in the controversy and has no standing in this court to maintain its bill; (2) that the bill is without equity on its face and does not state a cause of action. The answer of the Interstate Commerce Commission sets up its findings of fact and its order, and contends that inasmuch as these findings are supported by substantial evidence, they are conclusive upon the court, and hence that the plaintiff is not entitled to any relief. On this hearing the full transcript of the proceedings and testimony taken by the Interstate Commerce Commission, in addition to its report and order, were introduced in evidence, and are considered in disposing of the several matters presented for consideration.

Plaintiff assails the validity of the Interstate Commerce Commission's order on several grounds, which, stated in our own language, reduce themselves to two: (1) That Congress has not conferred jurisdiction on the commission over an electric interurban railway company of the kind which the record shows the Pennsylvania-Ohio Power & Light Company to be, particularly over its purely intrastate transportation of passengers conducted under State and municipal franchise which are in legal effect binding contracts; (2) that the franchise granted by the village of Hubbard to the predecessor in title of the Pennsylvania-Ohio Power & Light Company, and duly accepted by it and binding as a contract on the present defendant, requires the transportation of passengers between Hubbard, Ohio, and Youngstown, Ohio, at a fixed rate of fares, which franchise contract cannot be impaired by an order of the Interstate Commerce Commission, and is, indeed, beyond the constitutional power of Congress itself to annul and impair. Such, in brief, are the respective contentions.

82 The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published, 64 I. C. C. 498, it will not be repeated here except so far as is necessary to show clearly the questions to be decided and the basis of our decision. In 1901 a franchise ordinance was passed by the village of Hubbard and accepted by the Youngstown & Sharon Railway Company, a corporation chartered as a street railway under the statutes of Ohio, to operate between Youngstown, Ohio, and Sharon, Pennsylvania. In 1917 this company was merged with four other Ohio corporations and one Pennsylvania corporation, under the name of The Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to The Pennsylvania-Ohio Electric Company. On November 21, 1920, a new corporation, the present defendant, The Pennsylvania-Ohio Power & Light Company, was organized to take over and operate the Youngstown-Sharon line. The line thus acquired by defendant, and now operated by it, extends from Youngstown, Ohio, only to the Ohio-Pennsylvania State line, and the defendant operates its cars from the State line into Sharon, Pennsylvania, a fractional part of a mile, over the tracks of the Shenango Valley Traction Company.

The maximum distance from Youngstown to Hubbard is 8.75 miles, and from Hubbard to Sharon is 7.18 miles. The franchise provides for the maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon of a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets good for 22 rides for $2.00, and 54-trip commutation tickets for $3.80. Effective February 15, 1920, this Mahoning & Shenango Railway & Light Company, then the owner and operator of defendant's line, by a tariff filed with the Interstate Commerce Commission, increased its one-way fare
83 between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5.00, and cancelled the round-trip and special tickets between these points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, also filed with the Interstate Commerce Commission a tariff in which it proposed to establish the same rates of fare between Hubbard and Youngstown as those in effect between Hubbard and Sharon, as above stated, and also to increase and establish certain through fares between Sharon and Youngstown, being substantially the sum of the local fares. A tariff carrying these same fares was presented to, and rejected by, the Public Utilities Commission of Ohio in so far as it attempted to increase the fares between Hubbard and Youngstown, on the ground that this commission was without jurisdiction to allow and establish rates and charges in excess of those prescribed by franchise contracts. This seems to be the present state of the Ohio law. See Mahoning & Shenango Ry. & Light Co. v. Public Utilities Commission, 98 O. S. 303; Interurban Ry. Co. v. Public Utilities Commission, 98 O. S. 267; Toledo, Bowling Green & Southern Traction Co. v. Public Utilities Commission, 98 O. S. 305. In consequence of these complications the Pennsylvania-Ohio Power & Light Company filed its petition with the Interstate Commerce Commission complaining of the undue preference and discrimination existing between interstate and intrastate passenger fares, which, after notice and on hearing, resulted in the order above stated, which plaintiff is seeking to enjoin.

The Interstate Commerce Commission's findings of fact, it is settled law, are conclusive upon this court if supported by substantial evidence. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62. The commission's findings of fact in this situa-
84 tion are: That the interstate passenger cash and 54-ride commutation fares between Sharon and Hubbard, and also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable

interstate fares between Sharon and Hubbard has resulted, and will result, in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the State of Pennsylvania and between points in the State of Ohio and Sharon, Pennsylvania, in undue preference and advantage to persons traveling intrastate between points in Ohio, and in unjust discrimination against interstate commerce; also, that whether the passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can, and should, be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found to be reasonable as between Hubbard and Sharon. It is ordered that passenger fares between Hubbard, Ohio, and Youngstown, Ohio, shall be charged which shall not be less than 20 cents when paid in cash and $5.00 for 54 rides when a commutation ticket is purchased.

Plaintiff's contention that defendant's railroad is not that kind of a railroad engaged in interstate commerce or transportation which is made subject to the jurisdiction of the Interstate Commerce Commission, requires an inquiry as to whether the facts found in this respect by the Commision support its asumption of jurisdiction. Plaintiff contends that it is not engaged in the general business of transporting freight in addition to its passenger and express
85 business, and that it is not operated as a part of a general steam railroad system of transportation. The controversy before the commision involved nothing except passenger fares. In the commission's report it is said: "Petitioner is also engaged in the transportation of freight, as will be later explained." Later in the report the facts in this regard are stated. The defendant has two connections, one direct, and the other over a private siding at Masury and at stop 41, both between Hubbard, Ohio, and Sharon, Pa., with the New York Central Railroad. It does not originate and deliver freight traffic to the New York Central Railroad, but during the year 1919 and 1920, 922 cars of freight were received by it from that line for delivery chiefly at points on defendant's line. The defendant also operates a daily less-than-carload freight or parcel package service between Youngstown and Sharon, and on three days a week operates a through car for such service from Sharon in Pennsylvania to Newcastle, Pa. This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio and is transported on a line not owned by defendant. In 1919 this less-than-carload freight amounted to 6,240 tons and produced a gross revenue of $18,000. The revenue from carload and switching services on cars received from the New York Central was $6,246.52. In 1920 the less-than-carload freight was 5,474 tons and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The passenger revenue receipts for 1920 were $332,173.43,

and an 1921 were $367,529.22. Thus it appears that the entire receipts from freight and switching services, including the carload freight from Sharon in Pennsylvania to Newcastle, Pennsylvania, are equal, substantially, to 7 per cent only of the entire gross earnings. Plaintiff asserts that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line, and that its less-than-
86 carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight traffic.

Upon these facts logically the first proposition of law to be considered is whether defendant's objection is sound, that the plaintiff is without interest in the controversy and has no standing in court. Neither in the oral argument nor in the briefs filed is this proposition given much consideration, and no authorities are cited supporting the contention. We assume this contention to be that the village of Hubbard in its corporate capacity has no such interest in the rights of passengers on defendant's railway, even though citizens and residents of the village of Hubbard, as will entitle it to maintain an action in their behalf, and that this case falls within the rules of law announced in Oklahoma v. A. T. & S. F. Ry. Co., 220 U. S. 277. In this case it was held that the State of Oklahoma might not sustain an original bill in the United States Supreme Court to enjoin undue discrimination against its citizens in favor of citizens of the State of Kansas. The principles of that case are not applicable. The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared, and was heard. Section 13, interstate commerce act, permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the commission to institute inquiries on its own motion or on the petition of any carrier into any rate or fare made or imposed by authority of any State. Obviously, therefore, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard, and if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the
87 commission. It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the commission and to be heard in court against its orders. See Judson on Interstate Commerce, 3rd Ed., sec. 437. In City of New York v. United States et all. (2 C. C. A.), 272 Fed. 768, a municipal corporation, the city of New York was the party plaintiff, and although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action.

Moreover, Ohio municipal corporations, when parties to a franchise contract, may be parties to actions to enjoin a violation or to

enforce the terms thereof. G. C., sec. 4311 and 4312; City of Springfield v. Springfield Gas Co., 12 C. C. (N. S.) 392, affirmed without report, 81 O. S. 537. No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not both here and before the Interstate Commerce Commission become a party to and maintain such suits as are necessary to assert and protect its contract rights.

Defendant's objection that plaintiff's bill does not state a cause of action, and plaintiff's objection that the order of the Interstate Commerce Commission is void because defendant's electric street or interurban railway is not brought within the power and authority conferred by Congress on the commission, depend upon the same considerations, and will be considered together. Plaintiff's objection that the order of the commission, if within the apparent power thus conferred on the commission is none the less void because it invades the reserved power of a State over purely intrastate transportation or because it impairs the obligations of a franchise contract, depends upon separate and independent considerations. We shall consider these propositions in the reverse order.

In the view we take of this case it becomes unnecessary to
88 consider any question of constitutional power on the part of Congress. It is true that franchise grants, under the law of Ohio, are contracts binding upon both parties, and that the State of Ohio may not impair the obligation thereof. It is also true that a franchise of the kind under consideration, fixing the rate to control beyond the limits of the municipality granting it, is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it. See Interurban Railway & Terminal Co. v. City of Cincinnati, 93 O. S. 108; Interurban Railway Co. v. Public Utilities Commission, 98 O. S. 287; City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399. It may also be true that the principles of law announced in Houston & Texas Ry. Co. v. United States, 234 U. S. 343, known as the Shreveport case; American Express Co. v. Caldwell, 244 U. S. 617; Illinois Central Railway Co. v. Public Utilities Commission, 245 U. S. 493; and particularly in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., decided by the United States Supreme Court February 27, 1922, known as the Wisconsin passenger fare case, are not applicable to the precise situation here presented. However, we pass without deciding the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention.

Plaintiff contends that upon the facts as found the Pennsylvania-Ohio Power &*B* Light Company is not a street electric passenger railway engaged in the general business of transporting freight in addition to its passenger and express business, nor a street or

suburban electric railway operated as a part of a general steam railroad system of transportation, nor an interurban electric railway operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight,
89 but, on the other hand, is a street or interurban electric railway of a different character and such as has not been made subject to the jurisdiction of the Interstate Commerce Commission.

Apparently, then, the question at issue comes down to one of power in the Interstate Commerce Commission, that is to say, the power and authority conferred on the commission by the interstate commerce act. That act does not, by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers, or all interstate commerce or traffic. It is limited to interstate commerce or transportation carried on by certain kinds of interstate carriers. Thus Mr. Justice Lamar, delivering the opinion in Omaha Street Railway v. Interstate Commerce Commission, 230 U. S. 324, 336, said: "When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." It was accordingly held that an electric street railway operating in and between Council Bluffs, Iowa, and Omaha, Nebraska, over a bridge across the Missouri River constructed for freight and passenger traffic under an act of Congress was not subject to the jurisdiction nor its rates within the control of the Interstate Commerce Commission. A careful examination, therefore, of the several provisions of the interstate commerce act becomes necessary.

From 1887 to 1906 the purview of the act was limited to commerce between the States carried by railroads. By the Hepburn Act of 1906 oil pipe-lines, express companies and sleeping car companies were brought within its scope. By the act of 1910 were added telegraph, telephone, and cable companies. The transportation act of 1920 leaves the provisions of the act as to the carriers subject to the jurisdiction of the commission as they were in these previous acts, but refers more frequently to street or suburban and interurban electric railways in order to exclude them from the purview of certain provisions and sections of the act.

90 Section 1 provides, among other things, as follows: "That the provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property *wholly by railroad*, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * * but shall not apply (a) to the transportation of passengers or property or to the receiving, delivering, storage or handling of property *wholly within one State* and not shipped to or from a foreign country from or to any place in the United States as aforesaid." The most material language of the provision above quoted are the words "wholly by railroad" and "transportation of passengers or property * * *

wholly within one State." This language was in section 1 of the act of 1887, and has been repeated in this section every time the section has been amended. This section was amended and re-enacted with this language in the transportation act of 1920, and must, in ascertaining the meaning of the act, be given equal weight and significance with new paragraphs 3 and 4 of amended section 13, so much relied on by defendants. For the purposes of this case our inquiry is limited to a determination of what are common carriers by railroad, and the further inquiry is, what is a railroad within the purview of this act? The definitions of "common carrier" and of "railroad" and of "transportation" in paragraph 3, section 1, transportation act, 1920, give no aid in answering these inquiries.

It was not until the amendments of June 18, 1910, that street electric railways are mentioned in the act. The authority previously conferred to establish through routes subject to the limitation "that no reasonable or satisfactory through routes exist" was by the 1910 amendment enlarged so that the commission might thereafter, whenever it deemed it necessary or desirable in the public interest, establish through routes without regard to existing routes. This
91 power, however, was limited by a provision in these words: "The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character."

This language is ambiguous. Previous to its enactment, the Interstate Commerce Commission had assumed jurisdiction over electric street railways carrying passengers alone in numerous cases. See 7 I. C. C. 83; 13 I. C. C. 20; 20 I. C. C. 406; 20 I. C. C. 486. The provision above quoted, it was argued, was an indirect recognition that this jurisdiction was rightfully assumed and also a recognition by implication that electric street railways were railroads as defined in section 1, and were therefore subject to the jurisdiction of the commission. On the other hand, it was urged that this proviso was inserted out of an abundance of caution and to repel the implication that the word "railroad" as used in section 1 did include street electric railways as well as railroads well known highways of interstate commerce as understood when the original act was passed. In Omaha Street Railway Co. v. Interstate Commerce Commission, 230 U. S. 324, decided June 9, 1913, this difference of opinion was settled by holding that "railroads" as used in the interstate commerce act was limited to railroads as distinguished from street railroads, and that the proviso of June 28, 1910, above quoted, was probably inserted out of an abundance of caution and did not warrant the holdings previously made by the Interstate Commerce Commission and by the Commerce Court, that ordinary street electric railways engaged in interstate transportation of passengers had been brought within the jurisdiction of the Interstate Commerce Commission. This case will be referred to again at more length, but

before doing so, the several additional references to street elec-
92 tric railways in the interstate commerce act should be noted.

In section 1, paragraph 22, transportation act, 1920, it is provided: "The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

New section 15a is, in part, as follows: "When used in this section * * * the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies, (b) *street or suburban electric railways* unless operated as a part of a general steam railroad system of transportation, (c) *interturban electric railways* unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." It should be noted that this definition of the word "carrier" is for the purposes of section 15a. That section has for its object the establishment of such tariff rates as will enable the carriers, either as a whole or in groups, to earn an annual net railway operating income equal as near as may be to a fair return upon the aggregate value of their property. In passing it should also be noted that the provisions of this section and of section 20a are the main support of the enlarged jurisdiction of the Interstate Commerce Commission to fix purely intrastate rates, as will appear from a reading of Chief Justice Taft's opinion in the Wisconsin passenger fare case above cited.

New section 20a provides, in part, as follows: "That as used in this section the term 'carrier' means a common carrier by railroad
(except a street, suburban, or interurban electric railway
93 which is not operated as a part of a general steam railroad system of transportation), which is subject to this act, or any corporation orgainzed for the purpose of engaging in transportation by railroad subject to this act." This definition likewise is for the purpose of that section, and the section deals with the issue of capital stock or other securities by railroads, and confers wide powers with respect thereto upon the Interstate Commerce Commission.

The foregoing are all the references to street electric railways or interurban railways found in the interstate commerce act. However, two other references thereto are found in other parts of the transportation act of 1920. In section 209, providing for a guaranty to carriers during a limited period after termination of Federal control, it is provided: "When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under

Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, *which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.*"

In section 300, Title III, creating the Labor Board to deal with disputes between carriers and their employees and subordinate officials, it is provided: "When used in this title (1) the term 'carrier' includes any express company, sleeping car company, and any carrier by railroad, subject to the interstate commerce act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

94 Summarizing and bringing together the references to carriers above quoted, otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is "street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." In section 15, as amended June 18, 1910, and reenacted February 28, 1920, the reference is to "street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business." In new section 15a the reference is to "street or suburban electric railways unless operated as a part of a general steam railroad system of transportation." Also to "interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." In new section 20a the reference is to "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In section 209, Title II, transportation act of 1920, the reference is to "a street or interurban electric railway * * * which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." In section 300, Title III, the reference is "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Despite theses differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the commission. These characteristics are (a) being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal

95 source of operating revenue, urban, suburban, or interurban passenger traffice or sale of power, heat and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the commission. If they have those characteristics, obviously they would be under the jurisdiction

of the commission. This being true, does if not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the commission unless it possesses one or more of these disngushing characteristics? Before this question is answered we shall review the pertinent decisions.

As already stated, the Interstate Commerce Commission early assumed jurisdiction over street or interurban electric railways if engaged to any extent in the interstate transportation of passengers, even if not engaged in the general transportation of freight. See the references above given. In Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission, 179 Fed. 243, Circuit Judges Sanborn, Hook, and Adams, differing from the Interstate Commerce Commission, held that street railway companies engaged in operating street cars by electricity for the transportation of passengers were not within the definition of common carriers by railroad as used in section 1 of the Interstate Commerce Act, but that common carriers by railroad meant commercial railroad companies engaged in the general transportation of freight and passengers. Accordingly a preliminary injunction was awarded against the commission's order undertaking to regulate interstate transportation of passengers by an electric street railway. This case was transferred to the United States Commerce Court, and that court, on final hearing, reversed the circuit judges. See 195 Fed. 40. The United States Supreme Court, in Omaha Street Railway Co. v. Interstate Com-
96 merce Commission (supra), reversed the Commerce Court and affirmed the Circuit Court. In appraising the force and effect of this decision it is necessary to take into account the long line of Interstate Commerce Commission decisions prior thereto holding to the contrary, and to note carefully the reasoning of the Commerce Court in sustaining them. There is marked similarity in that reasoning and in the reasoning of the later opinions of the Interstate Commerce Commission upon the basis of which the order now under consideration was made.

Mr. Justice Lamar, delivering the unanimous opinion of the Supreme Court holding that street electric railways, although engaged in interstate transportation of passengers, were not common carriers by railroad, as defined in section 1 of the Interstate Commerce Act, gives reasons therefor which, it seems to us, are as sound to-day as they were in 1913. He says: "Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads which themselves are further connected with others so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic and for the use of a single community, even though that community

be divided by State lines or under different municipal control. When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." Further, "the railroads referred to in the act were not those having separate, distinct, and local street lines but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily
97 and expeditiously moved in interstate commerce." The mischief which Congress intended tor remedy by the interstate commerce act is adverted to as a reason tending to show that street electric railroads were not within the purview of section 1. Street railroads, he said, "had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit." The question, it is true, is left open as to the proper classification of that new type of interurban railway developed since 1887 and which, with electricity as motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is intimated that such electric interurban railways might be included within the definition of "common carrier by railroad" as used in section 1, but no opinion is expressed.

So far as we have discovered, the United States Supreme Court has not again given any consideration to this precise question. It has, however, considered the definition of a street or electric interurban railway as used in the safety appliance act and the federal employers' liability law (see Kansas City v. McAdow, 240 U. S. 51; Spokane & Inland R. R. Co. v. Campbell, 241 U. S. 17), and has held that an interurban electric railway operating from city to city and engaged in interstate traffic is within the purview thereof. The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, and inasmuch as interurban electric railways engaged in the interstate transportation of passengers are within the mischief to be remedied just as much as interstate steam railroads, the exception should be limited to street railways within cities and upon city streets and in their immediate suburbs. On the other hand, the rule of construction applicable to acts of Congress encroaching upon the power of a State to regulate and control the transportation of passengers and property
98 within a State is one of strict construction and will not include intrastate traffic unless the intent is plainly expressed. Thus, in Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, it is said: "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as its purpose to do so is clearly manifested."

In South Covington & Cincinnati Street Railway Co. v. City of Covington, 235 U. S. 537, much relied on by defendants the decision is wholly inapplicable and deals with entirely different questions. Nor does it seem to us that the question under consideration is materially affected, much less controlled, as is contended by defendants' counsel, by the Shreveport case (supra), American Express Co. v. Caldwell (supra), Illinois Central R. R. v. Public Utilities Commission (supra), nor by new paragraphs 3 and 4, section 13, interstate commerce act, nor by the decision in the Wisconsin rate case. The question here is, What interstate carriers by railroad and what classes of interstate and intrastate traffic are brought within the jurisdiction of the Interstate Commerce Commission? This is a question of intention and is to be ascertained from the provisions of the interstate commerce act, including its original as well as amended provisions, and the several decisions of the Supreme Court construing the same. The decision in the Wisconsin rate case rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly-added powers and duties, including those conferred by paragraphs 3 and 4 of
99 new section 13, apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged. Assuming for the purpose of this opinion the existence in Congress of a power to include all street and interurban electric railways, and to invalidate all municipal and State franchises relating to purely intrastate traffic, upon the principles of the Shreveport and Wisconsin rate cases, nevertheless the intent so to do will not be inferred unless and except so far as it is clearly manifested.

From the foregoing considerations we deduce these conclusions: Electric street, suburban, or interurban railways are included within "common carriers by railroad." as that expression is used in section 1 of the interstate commerce act, only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part of a general steam railroad system of transportation; they must be engaged in the general business of transporting freight in addition to their passenger and express business; or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business. This, it seems to us, is the only proper interpretation and effect of the several amendments to the

interstate commerce act made since the decision in the Omaha Street Railway case. In that case, as already stated, it was left a query as to whether the act included the new type of interurban railroad developed since the original act was passed, which operates with electricity as motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language, but it used other language continuously and consistently which does exclude all electric street or interurban railways which do not possess these dominating characteristics, that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated nor doing business of that character in the situation in which they were left by the decision in the Omaha Street Railway case. This conclusion is greatly strengthened by the additions to the interstate commerce act made by the transportation act of 1920. The establishment of the Labor Board to settle controversies between carriers and employees, the guaranty for a limited period of a fixed return upon railroads, the grouping of railroads into classes and requiring rates to be fixed so as to allow a fair return to be earned on the property as a whole, the control assumed and exercised over the construction of new railroads, and the making of extensions and the issuance and sale of securities, are all a part of a general scheme from which all street or interurban electric railways are excluded unless possessing these characteristics.

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The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation or was engaged in the general transportation of freight in addition to its passenger and express business. Plainly and admittedly, the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads, but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway. Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express

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business. It is true that the commission's report refers thereto as less-than-carload freight, but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the interstate commerce act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed.

MAURICE H. DONAHUE,
Circuit Judge.
JOHN M. KILLITS,
D. C. WESTENHAVER,
District Judges.

(All italics in sections and in quotations of statutes and from opinions are mine, unless otherwise noted.)

102 In United States District Court.

Order granting preliminary injunction and denying motion to dismiss, filed and entered March 13, 1922, Maurice H. Donahue, Circuit Judge, John M. Killits, D. C. Westenhaver, District Judges.

[Title omitted.]

This cause having been heretofore, to-wit, December 27, 1921, heard, argued, and submitted on plaintiff's application for a preliminary injunction, and on the motions of the defendants, United States of America, and The Steubenville, East Liverpool & Beaver Valley Traction Company, to dismiss plaintiff's bill, and the court having duly considered the same, it is adjudged, ordered, and decreed that the motions to dismiss be, and they are hereby, overruled, and that a preliminary injunction be, and is, awarded as prayed in plaintiff's bill, enjoining and restraining said defendants, until the further order of this court, from putting into force and effect the order of the Interstate Commission herein complained of, made on the 7th day of November, 1921, so far as said order authorizes, permits, and requires the defendant railway company to establish, maintain, and collect passenger fares greater than, or different from, the rates of fare prescribed in the franchise ordinances granted by the city of Wellsville to the predecessors in title of the defendant railway company and now owned by it.

Plaintiff being a municipal corporation, no bond is required.

103 In United States District Court.

Final decree, filed and entered November 20, 1923, by Maurice H. Donahue, Circuit Judge, John M. Killits, D. C. Westenhaver, District Judges.

[Title omitted.]

This cause came on for final hearing at this term on the record as stipulated by the parties as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon, upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of The Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity be, and the same is hereby, annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants, The Interstate Commerce Commission and The Steubenville, East Liverpool and Beaver Valley Traction Company, and each of them be, and they are hereby, permanently enjoined and restrained from putting into effect the aforesaid order of the Interstate Commerce Commission of November 7, 1921.

To all of which the defendants and each of them and their respective counsel severally object and except.

104 In United States District Court.

Order that certified copies of ordinances of city of Wellsville be received in evidence, filed and entered November 20, 1922, by Maurice H. Donahue, Circuit Judge and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

This cause came on for hearing; and whereupon the counsel for plaintiff offered certified copies of certain ordinances of the city of Wellsville and numbered 181, 408, 594, 610, and 649, to which offer the counsel for the United States and the counsel for the Interstate Commerce Commission in open court objected; whereupon it was ordered that such obligations be overruled and that such certified copies be received in evidence on the issues between plaintiff and defendant, The Steubenville, East Liverpool and Beaver Valley Traction Company only; to which ruling of the court, the counsel for the United States and the counsel for the Interstate Commerce Commission then and there in open court objected and excepted.

105 *Ordinance No. 181.*

Granting permission to Albert L. Johnson, Sidney H. Short and C. E. Grover of Cleveland, Ohio, their successors and assigns, to construct, maintain, and operate an electrical street railroad, with a single track, and the necessary turn-outs, turn-tables, side-tracks, poles, wires and appurtenances from, at, or near the east corporate limits of Wellsville, at or near the county road leading from East Liverpool to Wellsville, thence along said road and a trestle across Yellow Creek to Coal Street, or State Road, thence along said Coal Street to Third Street, thence along Third Street to Main Street, thence along Main Street to Nicholson Lane, and fixing the terms and conditions of said grant, for the period of twenty-five years.

Section 1. Be it enacted by the council of the city of Wellsville, Ohio, that Albert L. Johnson, Sidney H. Short and C. E. Grover, of Cleveland, Ohio, their successors and assigns are hereby granted permission to construct, maintain, and operate for the period of twenty-five years an electrical street railroad, with a single track and the necessary switches, turn-outs, turn-tables, side-tracks, poles, wires, and appurtenances, through the city of Wellsville, Ohio, along the following route:

Beginning at or near the east corporate limits of Wellsville, at the county road, leading from East Liverpool to Wellsville, thence along said road and a trestle bridge across Yellow Creek to Coal Street, or State Road, thence along Coal Street to Third Street; thence along Third Street to Main Street, thence along Main Street to Nicholson's Lane.

Section 2. All said tracks shall be laid under the direction of the improvement committee of the city council, and in all streets or parts of streets along said route, which are paved at the time of constructing said street railroad therein, said grantees shall use in constructing their tracks, and its turn-outs and side tracks a steel girder
106 rail of the most approved pattern for such purpose, and weighing not less than eighty-two pounds to the yard; and in all streets and highways along said route not paved when said tracks are constructed therein, said grantees shall use a heavy T rail and shall, during the period of this grant so maintain the surface of the roadway within said tracks and outside the said T rails, except on trestles, as that vehicle in said roadway shall not be obstructed in crossing said tracks at any point in and along said highway.

At all points along said route where pavement is laid when said tracks are constructed, and whenever along said tracks the roadway shall be paved by said city, the said grantees, for themselves, their successors and assigns, shall disturb, take up, or injure the same, in all such cases restoring such pavement to as good condition as the same was in before so taken up, disturbed, or injured by grantees, their successors or assigns.

Section 3. In all streets and parts of streets along said route where pavement is laid when such track is constructed said track shall

be laid in the center of said street, except that between Twelfth Street and Nicholson's Lane in Main Street said track shall be laid as near as practicable to the south line of said street, and in all streets and highways not paved when said track is constructed, such track shall be located and constructed therein as shall be most convenient for general use of said highway and the railroad use therein. And in all streets and highways along said route not paved when said track is constructed, but which hereafter be paved, there grantees agree to substitute girder rail for T rail when such pavement is made. And whenever the city council shall cause any change of grade of any street or highway along said route, the grantees for themselves, their successors and assigns, agree at their own expense to alter the grade of their railroad tracks
107 and make them conform to such changed grade of such street or highway, the city, however, in any and every change of grade to bear the expense of relaying all pavement disturbed by such change of grade. The city reserves to itself the right to disturb, remove, or interrupt travel over said tracks whenever and wherever it shall be necessary to construct or repair sewers, water or gas pipes, bridges, culverts, or other municipal purposes, and when the street in any such case is restored, the grantees, their successors and assigns, shall there restore, relay and connect their said track at their own expense.

Section 4. The grantees, their successors and assigns, of said railroad, and the permission herein granted, hereby agree to hold said city of Wellsville harmless of and from all damages and injuries caused by said grantees, their successors and assigns, in or by the construction, maintenance, or operation of said electrical street railroad and its appurtenances, and agree to place good and sufficient cars and continue the same on said road with modern improvements, and run them daily as often and at such rates of speed as public convenience may demand and the council may require.

Section 5. The said grantees shall, if they accept the provisions of this ordinance, file such acceptance in writing with the clerk of the city of Wellsville, within thirty days after the passage thereof, and within said time file a bond with the city clerk, in the sum of $5,000.00, conditioned for the faithful performance of all the conditions of their ordinance, and shall begin construction of said railroad within ninety days of such acceptance, and shall have said railroad completed and in operation within one year from the expiration of said ninety days; and on failure to perform either of these within the time specified, or any other condition of this ordinance, except for cause beyond the control of grantees, this ordinance shall be absolutely void.

Section 6. Upon the acceptance of this ordinance the
108 construction of the street railroad hereunder, grantees, their successors and assigns, shall have the right to charge and collect fares of five cents each for each ride of each passenger carried over the whole or any part of said route or any extension

thereof, and tariff for each parcel of freight of ten cents per each hundred pounds or fraction thereof carried over the whole or any part of said route, or any extension thereof; provided no charge shall be made for children under five years of age, accompanied by parents or guardians, and no charge shall be made for baggage or parcels carried in the hands of the passengers.

Grantees, their successors and assigns, may use upon their cars either conductors or fare boxes, as they may find most practicable.

The city of Wellsville, by its council, hereby agrees not to change the rate of fare or tariff in this section, provided during the period of this ordinance granted, and that it will not, within such period, make any other requirements or exaction of grantees, their successors or assigns, in respect of pavement, cars, or maintenance of roadway, than in this ordinance provided.

Section 7. This ordinance shall take effect on its passage and publication, and payment of costs of publication of ordinance and former notice, and the filing of written acceptance of its terms and conditions as herein provided.

Passed September 14, 1891.

J. W. NIXON, *Pres. of Council.*

C. B. MAYLONE, *City Clerk.*

Section 12. This ordinance is upon condition and the grantee hereunder, for itself, its successors and assigns, agrees that in the event of the right being granted by the city to other street railway companies to operate cars in the said city, this granted, its successors or assigns, will permit said other company or com-
109 panies to cross its tracks with their tracks at all points deemed by council of the city proper and reasonable.

Section 13. This ordinance and grant are upon the further condition, viz: That said grantee, its successors or assigns, shall bear the expense of repaving the width of its ties along all streets on which its tracks are laid, on which the city shall at any time during the period of this grant deem necessary to repave, by reason of the paving being worn or out of repair.

Section 14. Said The East Liverpool Railway Company shall file its written acceptance of the provisions of this ordinance with the city clerk within ten days from its passage, otherwise same shall be null and void.

Section 15. This ordinance shall take effect and be in force on its passage and legal publication and the filing of the written acceptance of its terms and conditions as hereinbefore provided, the company to pay the cost of publication.

Passed November 19th, 1901.

D. F. STEINER,
President of Council.

J. W. MCQUEEN, *City Clerk.*

110 (Ordinances of the city of Wellsville, numbered 408, 594, 610, and 649, filed December 9, 1922.)

Ordinance No. 408.

Granting the East Liverpool Railway Company, its successors and assigns, permission to extend its tracks, and construct, maintain, and operate electrical street railroad with single track and the necessary passing sidings, turntables, poles, wires, and appurtenances on Eighteenth Street and Clark Avenue, in Wellsville, Ohio, and fixing the terms and conditions of said grant for a period of twenty-five years and renewing and extending for the same period the grant and franchise now owned by said company.

Section one. Be it ordained by the council of the city of Wellsville, Ohio, that the East Liverpool Railway Company, its successors and assigns, is hereby granted permission to construct, maintain, and operate for a period of twenty-five years from date of the final passage of this ordinance, an electrical street railroad, with a single track, and the necessary passing sidings, turntables, poles, wires, and appurtenances, on the following streets in the city of Wellsville, Ohio, viz: On Eighteenth Street (also called Nicholson's Avenue) from Main Street to Clark Avenue, and on Clark Avenue from Eighteenth Street southerly to the southern end of Clark Avenue.

Section two. All tracks shall be laid under the direction of the city engineer of the city of Wellsville, Ohio, and said grantee shall use in constructing its tracks and passing sidings a steel girder rail of the most approved pattern for such purpose, and weighing not less than seventy-two pounds to the yard, with flange way not less than three inches wide.

Section three. The tracks aforesaid shall be located on said street to the approval of the improvement committee of the city council at the time of the construction of the work: provided, however, that no passing sidings or turntables shall ever be allowed on Eighteenth Street, and the tracks of said grantee shall be located on the southern side of Eighteenth Street.

Section four. All tracks shall be laid to the established grade of said streets, and whenever the city council shall cause any change of the grade of any street along said route, said The East Liverpool Railway Company, its successors and assigns, agree at their own expense to alter the grade of their railroad tracks and make them conform to such changed grade of such street, the city, however, in any and every such change of grade to bear the expense of relaying all pavement disturbed by such change of grade. The city reserves to itself the right to disturb or remove said tracks or interrupt travel over said tracks whenever or wherever it shall be necessary to construct or repair sewers, water or gas pipes, bridges or culverts, or for other municipal purposes, and when the street in such case is restored the East Liverpool Railway Company, its successors or

assigns, shall then restore, relay, and connect said track at their own expense.

111 Section five. At all places along the aforesaid route where pavement is laid when said tracks are constructed, and wherever along said tracks the roadway shall hereafter be paved, the said The East Liverpool Railway Company, for itself, its successors and assigns, bind themselves to relay and repair such pavement whenever and wherever they shall disturb, take up, or injure the same, in all such cases restoring the pavement to as good condition as the same was in before so taken up, disturbed, or injured. Provided, further, that if said The East Liverpool Railway Company shall fail to relay and repair such pavement within thirty days notice from the city, then the city may relay and repair same at the expense of said The East Liverpool Railway Company, its successors or assigns.

Section six. This ordinance and the grant therein contained is upon the following condition, to-wit: That whenever the city shall pave Clark Avenue, Lisbon Street, and Liverpool Street, or either of them (now unpaved) the said The East Liverpool Railway Company, its successors or assigns, shall bear all the expense of paving the width of its ties, to be not less than eight feet, for the entire length of its tracks on said streets, and said The East Liverpool Railway Company binds itself, its successors and assigns, to pay to said city the cost and expense of said paving within thirty days from the completion of said work and notice from the city, and further to pay the cost of the recent re-paving of Third Street from Broadway to Lisbon Street, for the width of its ties, within thirty days from the passage of this ordinance.

Section seven. The said The East Liverpool Railway Company for itself and its successors and assigns of the permission herein granted, agrees to hold the said city of Wellsville, Ohio, harmless from all damages and injuries caused by the construction, maintenance, or operation of said electrical street railroad and its appurtenances, and agree to place good and sufficient cars and continue the same on said road with modern improvements, and run them daily as often and at such rates of speed as public convenience may demand and the city council may require.

Section eight. This ordinance is upon condition that the road built hereunder be operated in connection with and as an extension of the present railway lines of said grantee, in Wellsville and East Liverpool and between said cities, and extensions thereof, and no extra fare or freight tariffs shall be charged by said company or its successors or assigns for service on this extension, but the regular fare on the other parts of said line shall include service to and from all parts of this extension to and from all other parts of said company's lines.

Section nine. The said The East Liverpool Railway Company agrees to complete the construction of its tracks and operate its cars over the entire route herein granted April 1st, 1902, and if it fails to

so construct and operate said road by said date, this ordinance shall then be and become null and void.

Section ten. At any time after the completion of the construction of the street railroad over the route provided for by this ordinance, if the city council shall deem it to the public interest that said railroad be extended from the southern terminus, to the south corporate limits of Wellsville, and the necessary consent of property owners be given therefor, the East Liverpool Railway Company binds itself, its successors and assigns, to extend said street railroad and operate same to such south corporate limits, within ninety 112 days after notice so to do by resolution of the city council and the passing of an ordinance by said council granting said right.

Section eleven. The rights, privileges, and franchises granted by ordinance of this council to Albert L. Johnson, Sidney H. Short, and C. E. Grover, their successors and assigns, September 14, 1891, see ordinances of Wellsville, Ohio, pages 180, 181, and 183, inclusive (to which reference is hereby made for the full detail and text of the ordinance above mentioned), which rights, privileges and franchises are now owned and exercised by said The East Liverpool Railway Company, as successors and assigns of the above-named individuals, are hereby renewed, reaffirmed, and extended to said The East Liverpool Railway Company, its successors and assigns, for a period of twenty-five years from and after the passage and legal publication of this ordinance, and upon the same terms and subject to the same conditions contained in said original ordinance above mentioned. The original ordinance above mentioned is in language and terms as follows, to-wit:

"Granting permission to Albert L. Johnson, Sidney H. Short, and C. E. Grover, of Cleveland, Ohio, their successors and assigns, to construct, maintain and operate an electrical street railroad with single track, and the necessary turnouts, turntables, side tracks, poles, wires, and appurtenances, from, at, or near the east coporate limits of Wellsville, at or near the county road leading from East Liverpool to Wellsville; thence along said road and a trestle across Yellow Creek to Coal Street, or State Road; thence along said Coal Street to Third Street; thence along Third Street to Main Street; thence along Main Street to Nicholson's Lane, and fixing the terms and conditions of said grant for the period of twenty-five years.

1. Be it ordained by the city council of the city of Wellsville, Ohio, that Albert L. Johnson, Sidney H. Short and C. E. Grover, of Cleveland, Ohio, their successors and assigns, are hereby granted permission to construct, maintain and operate for the period of twenty-five years an electrical railroad with a single track and the necessary switches, turnouts, turntables, side tracks, poles, wires, and appurtenances, through the city of Wellsville, along the following route: Beginning at or near the east corporate limits of Wellsville at the county road leading from East Liverpool to Wellsville; thence along said road and a trestle bridge across Yellow Creek to

Coal Street or State Road; thence along Coal Street to Third Street; thence along Third Street to Main Street; thence along Main Street to Nicholson's Lane.

All tracks shall be laid under the direction of the improvement committee of the city council, and in all streets and parts of streets along said route which are paved at the time of constructing said street railroad thereon said grantees shall use in constructing their tracks and its turnouts and side tracks a steel girder rail of the most approved pattern for such purpose, and weighing not less than eighty-two pounds to the yard, and in all streets and highways along said route not paved when said tracks are constructed therein said grantees shall use a heavy "T" rail, and shall during the period of this grant so maintain the surface of the roadway within said tracks and outside of the "T" rails, except on trestles, so that vehicles in said roadway shall not be obstructed in crossing said tracks at any point in and along said highways. At all points along said route where pavement is laid when said tracks are constructed and wherever along said tracks the roadway shall hereafter be paved by said city, the said grantees, for themselves their successors
113 and assigns bind themselves to relay and repair such pavement wherever and whenever said grantees, their successors and assigns, shall disturb, take up, or injure the same, in all such cases restoring such paving to as good condition as the same was in before so taking up, disturbed, or injured by grantees, their successors or assigns.

3. In all streets and parts of streets along said route where pavements are laid when said track is constructed, said track shall be laid in the center of such street, except that between Twelfth Street and Nicholson's Lane in Main Street said track shall be laid as near as practicable to the south line of said street, and in all streets and highways not paved when said track is constructed such track shall be located and constructed therein as shall be most convenient for the general use of said highway and the railroad use therein.

And in all streets and highways along said route not paved when said track is constructed, but which shall thereafter be paved, these grantees agree to substitute girder rails for "T" rails when such pavement is made, and whenever the city council shall cause any change of grade of any street or highway along said route the grantees for themselves, their successors and assigns, agree at their own expense to alter the grade of their railroad tracks and make them conform to such changed grade of such street or highway; the city, however, in any and every such case of change of grade to bear the expense of re-laying all pavement disturbed by such change of grade. The city reserves to itself the right to disturb, remove, or interrupt travel over said tracks whenever and wherever it shall be necessary to construct or repair sewers, water or gas pipes, bridges or culverts, or other municipal purposes, and when the street in any such case is restored, the grantees, their successors and assigns, shall

restore, and shall relay and connect their said track at their own expense.

4. The grantees, their successors and assigns, of said railroad, and the permission herein granted, hereby agrees to hold said city of Wellsville harmless of and from all damages and injuries caused by said grantees, their successors and assigns, in or by the construction, maintenance, or operation of said electrical street railroad, and its appurtenances, and agree to place good and sufficient cars, and continue the same on said road with modern improvements, and run them daily as often and at such rates of speed as public convenience may demand and as the council may require.

5. The said grantees shall, if they accept the provision of this ordinance, file such acceptance in writing with the clerk of the city of Wellsville within thirty days after the passage thereof and within said time file a bond with the city clerk, to be approved by the city council, in the sum of $5,000 conditioned for the faithful performance of all the conditions of this ordinance, and shall begin construction of said railroad within ninety days after such acceptance and shall have said railroad completed and in operation within one year from the expiration of said ninety days; and on failure to perform either of these conditions within the time specified, or any other condition of this ordinance, except for cause beyond the control of grantees, this ordinance shall be absolutely void.

6. Upon the acceptance of this ordinance and the construc-
114 tion of the street railroad hereunder, grantees, their successors and assigns, shall have the right to charge and collect fares of five cents each for each ride of each passenger carried over the whole or any part of said route, or any extension thereof, and tariff for each parcel of freight of ten cents per each hundred pounds or fraction thereof carried over the whole or any part of said route or any extension thereof, provided no charges shall be made for children under five years of age, accompanied by parents or guardians, and no charge shall be made for baggage or parcels carried in the hands of the passengers. Grantees, their successors and assigns, may use upon their cars either conductors or fare boxes as they find most practicable. The city of Wellsville, by its council, hereby agrees not to change the rate of fare or tariff in this section provided during the period of this ordinance granted, and that it will not within such period make any other requirements or action of grantees, their successors and assigns, in respect of pavement, cars, or maintenance of roadway, than in this ordinance provided."

Section twelve. This ordinance is upon condition, and the grantee hereunder, for itself, its successors and assigns, agrees that in the event of the right being granted by the city to other street railway companies to operate cars in said city, this grantee, its successors and assigns, will permit said other company or companies to cross its tracks with their tracks at all points deemed by council of the city proper and reasonable.

Section thirteen. This ordinance and grant are upon the further condition, viz, that said grantee, its successors and assigns, shall bear the expense of repaving the width of its ties along all streets on which its tracks are laid, on which the city shall at any time during the period of this grant deem necessary to repave, by reason of the paving being worn or out of repairs.

Section fourteen. Said The East Liverpool Railway Company shall file its written acceptance of the provisions of this ordinance with the city clerk within ten days from its passage, otherwise same shall be null and void.

No. 408. Passed Nov. 19th, 1901.

D. F. STEINER,
President of Council.

J. W. MCQUEEN,
Clerk of Council.

Examined and approved by me November 19th, 1901.

A. P. DENNIS,
Mayor.

I, E. G. Bunting, clerk of the city of Wellsville, Ohio, do hereby certify that the foregoing ordinance was passed by council and advertised as required by law, was duly published, and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.] E. G. BUNTING,
City Clerk.

115 *Ordinance No. 594.*

An ordinance granting to the East Liverpool Railway Company, its successors and assigns, permission to double track, maintain, and operate its street railroad in and on certain streets in the city of Wellsville, Ohio, and renewing and extending for the period of twenty-five years the grants and franchises now owned by said company.

Whereas the council of the city of Wellsville, Ohio, deems the double-tracking of the East Liverpool Railway Company's street railroad hereinafter authorized, beneficial to the public; and

Whereas the necessary consents of property owners therefor have been filed with the city clerk.

Therefore, be it ordained by the city council of the city of Wellsville, Ohio, as follows:

Section one. That the East Liverpool Railway Company be, and is hereby, authorized to lay an additional track parallel with its present track, and maintain and operate a double track street railway, with all the necessary switches, turnouts, turntables, wires, poles, and appurtenances, in, on, and along the following streets, viz: Beginning at or near the east corporation limits of Wellsville, Ohio, at the county road leading from East Liverpool to Wellsville; thence along the old county road known as Wells' Avenue or Liverpool Street to and across the bridge over Little Yellow Creek to Lisbon Street; thence

along Lisbon Street to Third Street; thence along Third Street to Main Street; thence along Main Street to Eighteenth Street or Nicholson Avenue; thence along Eighteenth Street or Nicholson Avenue to Clark Avenue; thence along Clark Avenue from Eighteenth Street or Nicholson Avenue to the west end thereof. Said additional track and the existing track shall be laid to the proper grade of the streets so that the center line between the two tracks shall be the center line of the streets, and the inner rail of each track shall be two feet and six inches from the center line of the street and parallel therewith as far as possible, except that from Twelfth Street to Eighteenth Street the tracks shall be laid as close as possible to the line of the Pennsylvania Company's land.

Section two. It is one of the conditions of this ordinance and one of the considerations of this grant for the use of said streets for a double track that grantee, or its successors or assigns, shall charge for a fare the sum of five cents for each person carried over the entire route from the westerly corporation line of Wellsville, Ohio, to the easterly corporation line of East Liverpool, Ohio, or the State line between Ohio and Pennsylvania or any part thereof, and no more, but policemen and regular paid firemen of said city when in uniform shall be carried free.

Section three. When constructing said line on Third Street and Main Street, said grantee, its successors and assigns, shall remove the old brick between the tracks and shall replace it with new brick, and all brick laid next the rails shall be of the kind commonly known as special rail brick. The tracks throughout said city shall be relaid upon at least fourteen inches of broken stone, and steel girder rails shall be used.

116 Section four. The present tracks shall be taken up and the new double track shall be fully relaid and completed within one year from the date of the passage of this ordinance. The said railway, its successors or assigns, shall open up but twelve hundred feet of street pavement at any one time in any one street and the same shall be fully restored to a proper condition and in good workmanlike manner, and any pavement or part thereof taken up shall be relaid within thirty days after it is so disturbed.

Section five. On the first day of October of each and every year during the exercise of this ordinance the said East Liverpool Railway Company, its successors and assigns, shall pay the city of Wellsville, Ohio, an annual tax of ten dollars upon each and every car operated on said lines within said city on regular schedule during the year ending on the first day of the preceeding September; but said tax shall not be paid upon such cars as are kept in reserve for cases of emergency or extraordinary traffic and which are not run on regular time schedules.

Section six. All the grants, privileges, and franchises mentioned herein and all parts of this ordinance shall be binding on the East Liverpool Railway Company, its successors and assigns, respectively,

and the same in like manner shall enure to the benefit of and be exercised by its grantees and assigns.

Section seven. If grantee fails to complete the said work of double tracking its road within the city at the time herein specified, then this grant shall become null and void at the election of the grantor, it being agreed that the time of performance of the work is of the essence of this grant, legal delays excepted.

Section eight. In order to carry out the provisions of this ordinance with reference to the proper laying of the tracks and the relaying of the brick pavement and the foundation put under the same, the mayor is hereby authorized to appoint not more than two inspectors at a salary of three dollars per day to see that such provisions are fully carried out when the work is in progress, which sum shall be paid by the grantees.

Section nine. Steam shall not be used as a motive power on the said road.

Section ten. The rights, privileges and franchises granted to Albert L. Johnson, Sidney H. Short and C. E. Grover, their successors and assigns, by ordinance of this council No. 181 passed September 14th, 1891, and to the East Liverpool Railroad Company, its successors and assigns, by ordinance of this council No. 408 passed November 19, 1901, being pages 238 and 246, inclusive, of the codified ordinance book of said city as codified in 1901, which rights and privileges are now owned by the East Liverpool Railroad Company, are hereby renewed, reaffirmed, and extended to said East Liverpool Railroad Company, its successors and assigns, upon the same terms and subject to the same conditions as are contained therein, for a period of twenty-five years from and after the passage and legal publication of this ordinance, and a like period of twenty-five years from and successors and assigns, shall have and exercise all the rights and privileges and franchises conferred upon it by this ordinance.

Section eleven. Within thirty days after the passage of this
117 ordinance, said grantee, or its successors and assigns, shall file with the clerk of this council its written acceptance of the provisions of this ordinance and shall also within said time file with the mayor a bond in the sum of twenty thousand dollars with sureties to be approved by the mayor, conditioned to indemnify the city against all loss and damage resulting to person or property during the construction of the railroad herein authorized and arising therefrom.

Section twelve. It is a condition of the granting of this franchise that in case said company and its employees are unable to amicably settle without strike or other interference with public rights any controversy or difference which may arise between them, then at the request of either the company or its employees, or if they refuse, at the request of the mayor or the president of council such controversy shall be submitted to a board of arbitration consisting of five disinterested persons, one of whom may be selected by the company, one by the employees and three of whom shall be appointed by the

judge of the Court of Common Pleas of Columbiana County, Ohio. In case any of the arbitrators thus chosen shall refuse to serve, his place shall be filled by said judge of the Court of Common Pleas. The finding of a majority of this board shall be binding upon all the parties to the controversy. The expense of the arbitration shall be borne by the company and its employees, one-half by each. This section shall apply to any other company which may hereafter operate cars over the lines constructed under this ordinance.

Section thirteen. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed Sept. 19, 1905.

A. B. CRUBAUGH,
President of Council.

J. W. MCQUEEN,
Clerk of Council.

Examined and approved by me Sept. 26th, 1905.

WALLACE L. FOGO,
Mayor.

Article of acceptance.

EAST LIVERPOOL, OHIO,
Oct. 4th, 1905.

To the hon. city council of the city of Wellsville, Ohio, gentlemen:

The East Liverpool Railway Company hereby accepts in writing the provisions of ordinance No. 594 passed by your honorable body Sept. 19th, 1905, approved by the mayor of said city, Sept. 26th, 1905, and entitled "An ordinance granting to the East Liverpool Railway Company, its successors and assigns, permission to double track, maintain and operate its street railroad in and on certain streets in the city of Wellsville, Ohio, and renewing and extending for the period of twenty-five years the grants and franchises now owned by said company." This written acceptance is filed in conformity with the provisions of section eleven of said ordinance.

THE EAST LIVERPOOL RAILWAY CO.,
By HEALY, *Pres.*

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WELLSVILLE, OHIO, *Oct. 4th, 1905.*

The above acceptance was filed with me this 4th day of October, 1905.

J. W. MCQUEEN, *City Clerk.*

I hereby certify that the foregoing ordinance was passed by council and advertised as required by law and was duly published and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.]

E. G. BUNTING,
City Clerk.

119 *Ordinance number 610.*

An ordinance granting to the East Liverpool Traction and Light Company, its successors and assigns, permission to extend its railroad to the southerly corporation limits of the city of Wellsville, Ohio, by the construction, maintenance and operation of a single or double track street railroad for a period of twenty-five (25) years.

Whereas all and singular the franchises, rights, and privileges granted to the East Liverpool Railway Company, by ordinance number 594 passed by the council of the city of Wellsville, on the 19th day of September, 1905, together with all and singular railroads constructed under and in pursuance thereof, or theretofore owned by the East Liverpool Railway Company, have been assigned, transferred, and conveyed to and are now owned by the East Liverpool Traction and Light Company, which company is now engaged in the operation of said railroads; and

Whereas the council of the city of Wellsville deems the extension of said railroad to the southerly corporate limits of the city beneficial to the public, and

Whereas the necessary consents of the property owners to such extension have been filed with the clerk of council:

Therefore, be it ordained and enacted by the council of the city of Wellsville, Ohio, as follows:

Section one. That the East Liverpool Traction and Light Company be, and is hereby, authorized to extend its railroad by the construction and maintenance of single or double tracks, and operate the same by the single overhead trolley system, or any other power than locomotive steam power, with the right to erect and maintain all necessary poles, wires, crossovers and other appurtenances for the proper operation of said railroad, in, on, and along the following streets, viz: Beginning at the present terminus of the street railroad on Clark Avenue; thence along Clark Avenue to Buckeye Avenue, formerly known as the Steubenville Road; thence along Buckeye Avenue southerly to the southerly line of Wellsville. The tracks of said railway shall be as near the praveled portion of Buckeye Avenue as possible and shall be laid to the proper grade of the street and wherever double tracks are laid the center line between the two tracks shall be as near the center line of the street as same can be ascertained, and the inner rail of each track shall be two feet and six inches from the said center line of said street and parallel therewith as far as possible.

Section two. It is one of the conditions of this ordinance and one of the considerations of this grant for the use of said street for single or double tracks that grantee, or its successors or assigns, shall charge for a fare the sum of five (5) cents and no more for each person carried over the entire route between the westerly corporation line of Wellsville, Ohio, and the State line between Ohio and Penn-

sylvania or any part thereof; but policemen and regularly paid firemen of said city, when in uniform, shall be carried free.

Section three. That the East Liverpool Traction and Light Company, its successors and assigns, shall pave between the rails of its tracks and to the ends of its ties, whenever and wherever the street outside of said ties is paves by the city, and with the same material that may be used by the city.

120 When the roadway is disturbed for the construction of said railway, the same shall be fully restored by the grantee, its successors and assigns, to a proper condition and in good workmanlike manner within sixty (60) days from the time same has been disturbed.

Whenever the council of said city shall by ordinance duly passed change the grade of said street, the said grantee, its successors and assigns, shall change its tracks so as to conform to the new grade, at its own expense. At all times where it shall become necessary to pave between said tracks all brick laid next the rails shall be of the kind commonly known as the special rail brick. Said tracks shall at all times be laid upon a foundation of at least fourteen (14) inches of broken stone or gravel, and steel girder rails shall be used.

Section four. The right to maintain and operate the tracks hereby granted shall continue in the East Liverpool Traction and Light Company, its successors and assigns, for the period of twenty-five (25) years from and after the 19th day of September, 1905.

Section five. Said single or double tracks shall be fully laid within one year from the date of the passage of this ordinance and if the said grantees, its successors and assigns, fails to complete the laying of said single or double tracks within the time herein specified, then this grant shall become null and void at the election of the grantor, it being agreed that the time of performance of the work is of the essence of this grant, legal delays excepted.

Section six. In order to carry out the provisions of this ordinance with reference to the proper laying of the tracks, paving, placing the foundation therefor, and locating said tracks in the street, the mayor is hereby authorized to appoint not more than two inspectors at a salary of three (3) dollars per day to see that said provisions are carried out fully when the said work is in progress, which sum shall be paid by the grantees, its successors or assigns.

Section seven. The said the East Liverpool Traction and Light Company, for itself and its successors and assigns, agrees to hold the said city of Wellsville, Ohio, harmless from all damages and injuries caused by the construction, maintenance, or operation of said street railroad, and its appurtenances.

Section eight. Should said grantor at any time during the term for which this franchise is granted, erect a fire station in said city, said grantee as part of consideration for this franchise, shall furnish twelve (12) sixteen (16) c. p. incandescent electric lights for said fire station without cost to said grantor.

Section twelve. Within thirty (30) days after the passage of this ordinance, said grantee, its successors and assigns, shall file with the clerk of the council its written acceptance of the provisions of this ordinance and shall pay for the publication of said ordinance.

121 Section thirteen. It is a condition of the granting of this franchise that in case said company and its employees are unable to amicably settle without strike or other interference with public rights any controversy or difference which may arise between them, then at the request of either the company, or its employees, or if they refuse, at the request of the mayor or the president of council, such controversy shall be submitted to a board of arbitration consisting of five (5) disinterested persons, one of whom may be selected by said company, one by the employes, and three of whom shall be appointed by the judge of the Court of Common Pleas of Columbiana County, Ohio. In case any of the arbitrators thus chosen refuse to serve, his place shall be filled by said judge of the Court of Common Pleas. The finding of a majority of this board shall be binding upon all parties to the controversy. The expense of the arbitration shall be borne by the company and its employes, one-half (½) each. This section shall apply to any other company which may hereafter operate cars over the line constructed under this ordinance.

Section fourteen. This ordinance shall take effect and be in force from and after the earliest period allowed by law. Passed by council June 18th, 1906.

Approved and examined by the mayor June 27th, 1906.

Accepted by said company July 19, 1906.

A. B. CRUBAUGH,
President of Council.
F. C. BLACKBURN,
Clerk of Council.
W. L. FOGO,
Mayor.

I, E. G. Bunting, clerk of the city of Wellsville, Ohio, do hereby certify that the foregoing ordinance was passed by council and advertised as required by law, was duly published, and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.] E. G. BUNTING,
City Clerk.

122 *Ordinance number 649.*

An ordinance granting to the East Liverpool Traction and Light Company, its successors and assigns, permission to extend its line by locating double street railway tracks on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street. And to use and maintain said tracks upon the terms and conditions and for the period provided

in ordinance number 594 but subject to certain conditions and stipulations herein made.

Whereas the East Liverpool Traction and Light Company is now owner of the rights and privileges and franchises granted to the East Liverpool Railway Company by ordinance number 594 passed by the council of the city of Wellsville, Ohio, on September 19th, 1905, and

Whereas the necessary consents of property owners therefor has been filed with the clerk of the council,

Therefore, be it ordained by the city council of the city of Wellsville, Ohio, that:

Section one. That the East Liverpool Traction and Light Company be, and it is hereby, authorized to lay double street railway tracks with all the necessary wires, poles, and appurtenances, in and along the following streets, viz: Beginning at the intersection of Seventeenth Street and Main Street; thence along Seventeenth Street to Clark Avenue; thence along Clark Avenue to Eighteenth Street. Said tracks shall be maintained and operated in connection with said company's present line, and shall be in lieu of the two tracks authorized by ordinance No. 594 on Main Street from Seventeenth Street to Eighteenth Street and on Eighteenth Street from Main Street to Clark Avenue. The privilege originally granted by ordinances No. 181 and 594 to lay and maintain double or single tracks on Main Street from Seventeenth Street to Eighteenth Street and on Eighteenth Street from Main Street to Clark Avenue shall be revoked and of no force and effect after acceptance by the East Liverpool Traction and Light Company of the terms of this ordinance and after completion of the tracks of said company on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street.

Section two. The said double tracks on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street shall be laid to the proper grade of the streets so that the center line between the two tracks shall be the center line of the streets, and the inner rail of each track shall be two feet and six inches from the center line of the street and parallel therewith as far as possible. The work of laying said tracks and paving same as required herein shall be completed within one year from the passage of this ordinance, legal delays excepted.

Section three. The said the East Liverpool Traction and Light Company shall pave on Seventeenth Street that portion of the street lying between the outer rails of the two tracks and to the outer ends of the ties at such time as Seventeenth Street shall be paved by action of council.

123 Section four. Where it becomes necessary for said The East Liverpool Traction and Light Company to open any paved street same shall be fully restored to a proper condition and in good

workmanlike manner and any pavement or part thereof taken up shall be relaid within sixty days after it has been disturbed.

Section five. The said The East Liverpool Traction and Light Company shall within sixty days from the completion of its tracks on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street, remove from the streets the tracks and ties now in use on Main Street from Seventeenth Street to Eighteenth Street and on Eighteenth Street from Main Street to Clark Avenue, and the pavement shall be relaid on a foundation of at least fourteen (14) inches of broken stone or gravel. Said pavement shall be restored to a proper condition and in good workmanlike manner within sixty days after the same has been disturbed and all broken or chipped brick shall be replaced by new ones.

Section six. Within thirty days after the passage of this ordinance, said The East Liverpool Traction and Light Company, its successors and assigns, shall file with the clerk of this council its written acceptance of the provisions of this ordinance. The said The East Liverpool Traction and Light Company shall pay for the publication of this ordinance.

Section seven. The maintenance, use, and operation of said street railway tracks shall be governed in all respects by the provisions and conditions of said ordinance No. 594 so far as the same are applicable thereto and not inconsistent with this ordinance, and said company, its successors and assigns, shall have the right to maintain and use the same for a period of twenty-five years from and after the date of the legal publication of said ordinance No. 594.

Section eight. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed November 25th, 1907.

A. B. CRUBAUGH,
President of Council.
F. C. BLACKBURN,
Clerk of Council.

Examined and approved by W. L. Fogo, Mayor.

I, E. G. Bunting, clerk of the city of Wellsville, Ohio, do hereby certify that the foregoing ordinance was duly passed by the council of the city of Wellsville, Ohio, and was duly advertised as required by law, was published and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.]

E. G. BUNTING,
City Clerk.

124 [Certificate of city clerk to ordinances Nos. 408, 594, 610 and 649 omitted in printing.]

[File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Stipulation for record for final hearing.

Filed Nov. 20, 1922.

By their respective counsel, the parties stipulate that the following matter shall constitute the record for the final hearing in the above-entitled cause, viz:

1. Bill in equity and exhibits.
2. Report, findings and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission, and exhibits.
5. Answer of the Steubenville, East Liverpool & Beaver Valley Traction Company, and exhibits.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.
8. As between the plaintiff and the Steubenville, East Liverpool & Beaver Valley Traction Company only, copies of the ordinances numbered 181, 408, 594, and 610 and 649 admitted in evidence by order of court over the objections and exceptions of the counsel for the United States and the counsel for the Interstate Commerce Commission who protest that the same are not properly a part of the record on any issue in the case.

Jos. E. O'Grady,
W. A. O'Grady,
Solicitors for Plaintiff.

126 Blackburn Esterline,
Assistant Solicitor General for the United States.
Edward M. Reidy,
Attorney for Interstate Commerce Commission.
Agnew Hice,
Tolles, Hogsett, Ginn & Morley,
Solicitors for the Steubenville, East Liverpool & Beaver Valley Traction Company.

127 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal by the United States of America and Interstate Commerce Commission to the Attorney General of Pennsylvania.

Filed January 15, 1923.

[Title omitted.]

To the Honorable George E. Alter, Attorney General of the State of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.

Service of the above notice is hereby acknowledged.
Dated at Harrisburg, Pa., this 13″ day of January, 1923.

GEO. E. ALTER,
Attorney General.

128 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal of the United States of America and Interstate Commerce Commission to the Attorney General of Ohio.

Filed January 11, 1923.

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the

same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.

Service of the above notice is hereby acknowledged.
Dated at Columbus, Ohio, this 10th day of January, 1923.

C. C. CRABBE, *Atty. Gen.*

129 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by United States of America and Interstate Commerce Commision.

Filed Dec. 21, 1922.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court made and entered November 20, 1922, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcrip of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

130 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the United States of America and Interstate Commerce Commission.

Filed Dec. 21, 1922.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come by their respective counsel, and in connection with their petition for appeal, file the following asignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered November 20, 1922.

The District Court erred:

1. In granting the application for preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission of November 7, 1921, "Ohio and Pennsylvania Rates, Fares and Charges," etc., No. 12092, so far as said order authorizes, permits and requires the Steubenville, East Liverpol & Beaver Valley Traction Company to establish, maintain, and collect passenger fares

131 greater than, or different from, the rates of fare prescribed in the franchise ordinances granted by the city of Wellsville to the predecessors in title of the defendant railway company and now owned by it.

2. In overruling the motion of the United States to dismiss the petition and in not sustaining the motion.

3. In holding and adjudging that the city of Wellsville was a proper party to maintain the complaint in equity and in not holding and adjudging that the court was without jurisdiction to entertain the same.

4. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares and Charges," etc., No. 12092, under the power and authority conferred upon it by the acts to regulate commerce.

5. In holding and adjudging that the Steubenville, East Liberpool & Beaver Valley Traction Company "is a street and interurban electric passenger railway, and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight."

6. In holding and adjudging that the Steubenville, East Liverpool & Beaver Valley Traction Company is not subject to the jurisdiction and regulation of the Interstate Commerce Commission.

7. In permanently annulling, setting aside, and holding for naught the order of the Interstate Commerce Commission of November 7,

1921, entitled "Ohio and Pennsylvania Rates, Fares and Charges," etc., No. 12092.

8. In making permanent the preliminary injunction and in permanently enjoining and restraining the Steubenville, East Liverpool & Beaver Valley Traction Company and the Interstate Commerce Commission from putting into effect the order of the commission of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092.

132 9. In making and entering the following order, viz:

This cause came on for hearing; and whereupon the counsel for plaintiff offered certified copies of certain ordinances of the city of Wellsville and numbered 181, 408, 594, 610, and 649, to which offer the counsel for the United States and the counsel for the Interstate Commerce Commission in open court objected; whereupon it was ordered that such objections be overruled and that such certified copies be received in evidence on the issues between plaintiff and defendant, the Steubenville, East Liverpool and Beaver Valley Traction Company only; to which ruling of the court the counsel for the United States and the counsel for the Interstate Commerce Commission then and there in open court objected and excepted.

10. In making and entering the following final decree:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be, and the same is hereby, annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants, the Interstate Commerce Commission and the Steubenville, East Liverpool and Beaver Valley Traction Company, and each of them, be, and they are hereby, permanently enjoined and restrained from putting into effect the aforesaid order of the Interstate Commerce Commission of November 7, 1922.

Wherefore, defendant and intervening defendant and each of them pray that the final order or decree of the District Court entered November 20, 1922, be reversed, annulled, and set aside, with directions that the permanent and the preliminary injunctions shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARREL,
Solicitor for Interstate Commerce Commission.

133 In United States District Court.

Order allowing appeal of U. S. of America and Interstate Commerce Commission, filed December 29, 1922, and entered by Maurice H. Donahue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

In the above-entiled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

134 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company to the Attorney General of Pennsylvania.

Filed Jan. 15, 1923.

[Title omitted.]

To the Honorable George E. Alter, Attorney General of the State of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company, defendant in the above entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

AGNEW HICE AND T. H. HOGSETT,
Attorney for the Steubenville, East Liverpool & Beaver Valley Traction Company.

Service of the above notice is hereby acknowledged, dated Harrisburg, Pa., this 13th day of January, 1923.

GEO. E. ALTER.
Attorney General.

135 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal of the Steubenville, East Liverpool & Beaver Valley Traction Company to the Attorney General of Ohio.

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company, defendant in the above entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

T. H. Hogsett and Agnew Hice,
Attorney for The Steubenville, East Liverpool & Beaver Valley Traction Company.

Service of the above notice is hereby acknowledged.

Dated at Columbus, Ohio, this 10th day of January, 1923.

C. C. Crabbe, *Atty. General.*

136 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company.

Filed Dec. 22, 1922.

The Steubenville, East Liverpool & Beaver Valley Traction Company, defendant, feeling itself aggrieved by the final order or decree of the District Court made and entered November 20, 1922, prays an appeal to the Supreme Court of the United States therefrom.

The particulars wherein it considers the final order of decree erroneous are set forth in the assignment of errors on file to which reference is made.

The Steubenville, East Liverpool & Beaver Valley Traction Company prays that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly

authenticated, may be transmitted forthwith to the Supreme Court of the United States.

AGNEW HICE AND T. H. HOGSETT,
Solicitors for The Steubenville, East Liverpool & Beaver Valley Traction Company.

137 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the Steubenville, East Liverpool & Beaver Valley Traction Company.

Filed December 22, 1922.

The Steubenville, East Liverpool & Beaver Valley Traction Company, defendant, now comes by its counsel, and in connection with the petition for appeal, files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court entered November 20, 1922.

The District Court erred:

1. In granting the application for preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission of November 7, 1921, "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092, so far as said order authorizes, permits, and requires the Steubenville, East Liverpool & Beaver Valley Traction Company to establish, maintain, and collect passenger fares greater than, or different from, the rates of fare prescribed in the franchise ordinances granted by the city of Wellsville to the predecessors in title of the defendant railway company and now owned by it.

138 2. In overruling the motion of the Steubenville, East Liverpool and Beaver Valley Traction Company to dismiss the petition and in not sustaining the motion.

3. In holding and adjudging that the city of Wellsville was a proper party to maintain the complaint in equity and in not holding and adjudging that the court was without jurisdiction to entertain the same.

4. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092, under the power and authority conferred upon it by the acts to regulate commerce.

5. In holding and adjudging that the Steubenville, East Liverpool and Beaver Valley Traction Company "is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight."

6. In holding and adjudging that the Steubenville, East Liverpool and Beaver Valley Traction Company is not subject to the jurisdiction and regulation of the Interstate Commerce Commission.

7. In permanently annulling, setting aside, and holding for naught the order of the Interstate Commerce Commission of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092.

8. In making permanent the preliminary injunction and in permanently enjoining and restraining the Steubenville, East Liverpool & Beaver Valley Traction Company and the Interstate Commerce Commission from putting into effect the order of the commission of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092.

139 9. In entering the following final decree:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be, and the same is hereby, annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants the Interstate commerce commission and The Steubenville, East Liverpool and Beaver Valley Traction Company and each of them be, and they are hereby, permanently enjoined and restrained from putting into effect the aforesaid order of the Interstate Commerce Commission of November 7, 1921.

Wherefore, defendant prays that the final order or decree of the District Court entered November 20, 1922, be reversed, annulled, and set aside, with directions that the permanent and the preliminary injunctions shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

AGNEW HICE AND T. H. HOGSETT,
Solicitors for the Steubenville, East Liverpool and Beaver Valley Traction Company.

140 In United States District Court

The Steubenville, East Liverpool & Beaver Valley Traction Company, Order allowing appeal, filed December 29, 1922, and entered by Maurice H. Donohue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

In the above-entitled cause, the Steubenville, East Liverpool & Beaver Valley Traction Company, defendant, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

It is further ordered that the Steubenville, East Liverpool & Beaver Valley Traction Company shall give bond on appeal in the sum of five hundred ($500) dollars conditioned as required by law and within ten (10) days from the date hereof.

Appeal bond of the Steubenville East Liverpool & Beaver Valley Traction Company for $500.

Filed and approved January 2, 1923.

[Omitted in printing.]

Citation.

[Omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 31st day of December, 1922.

JAS. E. AND W. A. O'GRADY,
Solicitor for Appellee.

Citation.

[Omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 31st day of December, 1922.

JAS. E. AND W. A. O'GRADY,
Solicitor for Appellee.

144 In United States District Court.

Order extending time for filing transcript of defendants until February 26, 1923, filed and entered by D. C. Westenhaver, Judge.

[Title omitted.]

On application of defendants and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Supreme Court be extended thirty days.

145 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Præcipe for record.

Filed Jan. 15, 1923.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause and include therein, in the order given below, the following:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answers of the Interstate Commerce Commission and exhibits.
5. Answer of the Steubenville, East Liverpool & Beaver Valley Traction Company and exhibits.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.
8. Order admitting in evidence certified copies of ordinances of the city of Wellsville numbered 181, 408, 594, 610, and 649, over the objections of counsel for the United States and of counsel for the commission on the issue between plaintiff and the Steuben-
146 ville, East Liverpool and Beaver Valley Traction Company only.
9. Ordinances of the city of Wellsville numbered 181, 408, 594, 610, and 649.
10. Stipulation for record for final hearing.
11. Final decree.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Praecipe for record.
16. Citation on appeal.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

147 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the United States District Court within and for said district, do hereby certify that the foregoing printed pages contain a full, true, and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal, and the bond on appeal, in accordance with the praecipe for transcript filed herein and the originals of which remain in my custody as clerk of said court.

There is also attached to and transmitted herewith, the citation issued and allowed herein.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district this 10th day of February, A. D. 1923, and in the 147th year of the Independence of the United States of America.

B. C. MILLER,
Clerk.

(Indorsed on cover:) File No. 29,421. N. Ohio D. C. U. S. Term No. 229. The United States of America, The Steubenville, East Liverpool and Beaver Valley Traction Company and Interstate Commerce Commission, appellants, *vs.* The City of Wellsville, Ohio. Filed February 23rd, 1923. File No. 29,421.

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